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No. 543

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

IN THE MATTER OF BLACK RANCHES, INC., A Nebraska Corporation, Debtor, in Corporate Reorganization Proceedings under Chapter X of the Federal Bankruptcy Act.

ROE R. BLACK, AVIS C. BLACK, ROE C. BLACK, BLACK RANCHES, INC., a corporation, Debtor, and THOMAS HART FISHER,

Petitioners,

vs.

PAUL STRAND, OTTO LAMPRECHT AND HOWARD THOMPSON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioners, Roe R. Black, Avis C. Black, Roe C. Black, Black Ranches, Inc., a corporation, Debtor, and Thomas Hart Fisher, respectfully pray this Court's writ of cer-

tiorari to review and reverse the decision of the United States Court of Appeals for the Eighth Circuit in this case, and to remand the case to the District Court of the United States for the District of Nebraska for further proceedings in that court.

CITATION TO OPINIONS BELOW.

The opinion and decision of the District Court of the United States for the District of Nebraska, insofar as Petitioners are informed, has never been officially reported.

The opinion and decision of the United States Court of Appeals for the Eighth Circuit in this case is reported in 362 Fed.(2d) 8, and is reprinted in full as Appendix I to this petition.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The opinion of the Court of Appeals was filed and its judgment rendered on May 12, 1966. Petitioners' petition for rehearing (with motions (1) that the language of the Court of Appeals' opinion be amended, and (2) that the Court of Appeals hear such petition and motion with such other judge or judges of some other United States Court of Appeals as might be designated by the United States Supreme Court) was denied without a supplemental opinion on June 21, 1966. This petition is filed within 90 days thereafter, in this Court.

This Court's jurisdiction is invoked under Section 1254(1) of the United States Judicial Code (U.S.C.A., Tit. 28, Sec. 1254(1)) which confers upon this Court jurisdiction to review decisions of the United States Courts of Appeals.

The United States District Court's jurisdiction was based upon the provisions of the Federal Bankruptcy Act (U.S.C.A., Title 11, Chap. 2, Section 2).

THE QUESTION PRESENTED FOR REVIEW.

The question for review is: Were Petitioners deprived of their right to due process of law under the Fifth Amendment to the Federal Constitution and under the Federal Bankruptcy Act and applicable Federal law because the trial judge wholly failed to perform his judicial duty when he allowed Respondents' secured Claim No. 5 as a lien against the Debtor's land in Brown and Blaine Counties, Nebraska, in the amount of $95,107.73 (together with interest) *solely upon the basis of certain claimed mortgage notes, trust deeds and assignment agreements which were never offered in evidence at the trial of Claim No. 5*, but to which documents the trial judge himself candidly revealed in his own opinion and decision that he had obtained "temporary access" *outside of the courtroom long after the trial was over?*

STATEMENT OF THE CASE.

This is a bankruptcy case which was instituted by five creditors against Black Ranches, Inc., a Nebraska corporation, under the corporate reorganization provisions of Chapter X of the Federal Bankruptcy Act, in the District Court of the United States for the District of Nebraska nearly twelve years ago on October 22, 1954. More than ten years later on December 4, 1964, the District Judge entered a judgment allowing Claim No. 5 of Respondents against the Debtor corporation as a secured lien in the amount of $95,107.73 on Debtor's land in Brown and Blaine Counties, Nebraska.

The primary question raised by the Strand Claim No. 5 (which question was *fully argued* in the Court of Appeals, *but which is not even mentioned in the Court of Appeals' opinion*) was whether there was any valid evidence whatsoever in the District Court to show that the Debtor corporation had ever executed and delivered, as security for two loans, any mortgage note or trust deed or any extension agreement which documents purported to create a lien on Debtor's land in Brown and Blaine Counties, Nebraska.

The trial judge himself candidly admitted in his own opinion and decision which he rendered on December 4, 1964, that *the only "evidence"* of the existence of the claimed mortgage notes, trust deeds and assignment agreements upon which his allowance of Respondents' Claim No. 5 was exclusively based had been obtained by the trial judge himself *outside of the courtroom and after the trial was long over* by what he himself described as "temporary access to partial abstracts of the title to the several parcels of such [Debtor's] real estate."

We quote from the trial court's opinion (R. 133-4):

> "In the trial of the issues now being considered, *the parties and their counsel refrained from the general presentation of evidence* respecting the detailed history of the title to that real estate, and its several parcels. Presumably, and apparently on solid ground, they considered it to be irrelevant to any problem then being submitted to this court. *During his consideration of the litigation, the judge presiding* [Judge Delehant], *against the possibility of their disclosure of significant information, sought and obtained* TEMPORARY ACCESS TO PARTIAL ABSTRACTS OF THE TITLE TO THE SEVERAL PARCELS OF SUCH REAL ESTATE. From their study, no information was gathered which even suggested any invitation for *supplemental* evidence, argument or briefing." (Emphasis added.)

In other words, the trial judge, having been unable to find any valid evidence whatsoever to support Respondents' Claim No. 5 in the record insofar as the indispensable original mortgage notes, trust deeds and assignment agreements were concerned, frankly admitted in his own opinion and decision that he had gone *entirely outside of the record* in finding proof of the existence of such documents, in order to sustain his allowance of Respondents' Claim No. 5.

The first opportunity which Petitioners ever had to challenge the right of the trial judge to find as a fact that there were any mortgage notes, trust deeds or extension agreements binding on Debtor which would justify an allowance of Respondents' Claim No. 5 as a secured claim in the amount of $95,170.73 on Debtor's land arose in the Court of Appeals. This question was fully briefed and argued by Petitioners in the Court of Appeals prior to the

opinion and decision rendered by that court; and the same right of the trial judge to base his finding and judgment allowing Respondents' Claim No. 5 against the Debtor's property upon documents furnished to him outside of the courtroom was likewise squarely challenged by Petitioners in their petition for rehearing (and other relief) which they timely filed in the Court of Appeals, after the decision and opinion was rendered in that court affirming the judgment allowing Respondents' Claim No. 5 which had been entered by the trial judge.

Respondents have filed in this Court as No. 1825 Miscellaneous their "Motion for Leave to File Petition for Designation of at least One Circuit Judge now sitting on One of the United States Courts of Appeals for some Circuit other than the Eighth Circuit to act jointly with the Judges of the United States Court of Appeals for the Eighth Circuit in passing upon and deciding the petitions for rehearing to be filed by Petitioners as Appellants in Appeals Nos. 17990-1-2 in said Eighth Circuit Court."

Although said petition filed as No. 1825 Miscellaneous in this Court has not as yet been ruled upon by the Court, Petitioners nevertheless desire to draw this Court's attention to such petition at this time and to incorporate it by reference in this petition, since it is relevant to the issues raised by this Petition for Writ of Certiorari.

REASONS RELIED UPON FOR THE GRANTING OF THE WRIT.

The plain fact is that in this case the trial judge totally violated his judicial duty to decide the merits of Respondents' Claim No. 5 to a secured lien on Debtor's land in the amount of $95,107.73 solely upon the record evidence in the trial court, by going entirely outside the record and obtaining "temporary access to partial abstracts of the title to the several parcels of such [Debtor's] real estate."

It is axiomatic that a trial judge deprives litigants of their right to due process of law under the Fifth Amendment to the Federal Constitution and under the Federal Bankruptcy Act and applicable Federal law when he decides to allow an unsecured bankruptcy claim in the amount of $95,107.73 solely upon the ground that Debtor was obligated under certain mortgage notes, trust deeds and extension agreements when such documents were never offered or received in evidence in the trial court, but which documents the trial judge later himself admitted in his own opinion and decision had been revealed to him solely from sources outside of the courtroom and to which he had obtained "temporary access" in the form of "partial abstracts of the title to several parcels of such [Debtor's] real estate." That both the trial judge's opinion and decision allowing Respondent's Claim No. 5 in the amount of $95,107.73, as well as the Court of Appeals' affirmance of such allowance, were both wholly erroneous is beyond dispute, because the trial judge's judgment was based solely upon such private knowledge as he had obtained from the "partial abstracts of title" to Debtor's real estate, and because the trial judge himself admitted in his own opinion and decision that these

"partial abstracts of title" were so sufficient for his purpose as not to require any "supplemental evidence, argument or briefing."

Southern Shipyard Corp. v. *The Tugboat Summitt, Inc.*, 294 Fed. 284 (4 C.C.A.);
Williams v. *U.S.*, 218 Fed. (2d) 473 (5 C.C.A.);
Central Hanover Bank & Trust Co. v. *Eisner*, 276 N.Y. 121, 11 N.E. (2d) 561;
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People v. *Dow*, 162 N.Y.S. (2d) 960;
Application of Palmer, 87 N.Y.S. (2d) 655;
Costello v. *Cassidy*, 210 N.Y.S. (2d) 46;
People v. *Beck*, 130 N.Y.S. (2d) 354.

The very fact that the Court of Appeals totally and deliberately ignored this crucial issue, although it was fully briefed and argued prior to the rendition of the Court of Appeals' decision, followed by the fact that the Court of Appeals later denied Petitioners' petition for a rehearing which raised this crucial issue, merely shows that the Court of Appeals was either unwilling or unable, or both, to face the consequences of the trial judge's unconstitutional deprivation and denial of Petitioners' right to due process under the Federal Constitution, and the Federal Bankruptcy Act and the applicable Federal law.

It would be hard for any court, including this Honorable Court, to deny that the integrity of the Federal Bankruptcy Courts demands that no secured claim amounting to over $90,000 upon a Debtor's property should ever be allowed in a bankruptcy proceeding *when there is not a scintilla of evidence in the record to support it,* and when the only supposed "evidence" relied upon by the trial judge himself was certain "partial abstracts of title" which he himself admitted he had secretly inspected, but the contents of

which were never revealed either to the bankrupt or the claimant at the trial of the secured claim.

In the Court of Appeals, Respondents pretended that there had been certain valid "evidence" of the existence of the supposed mortgage notes, trust deeds and extension agreements to which the Court of Appeals adverted in its opinion, *as though these documents had been offered and received in evidence in the trial court.* In the event that Respondents should boldly (but falsely) contend in their answer to this petition in this Court that the record in this case contains *any valid evidence* of the execution and delivery of *any* of the supposed mortgage notes, trust deeds, or extension agreements, or *any valid evidence* of the supposed defaults in *any* of the payments due thereunder, we wish this Court to know that such supposed "evidence" consists exclusively of *pleadings* filed by Respondents' predecessors in interest in a foreclosure case in the Nebraska State Court, which *pleadings plainly constitute no competent evidence of any such supposed documents or facts.* In other words, we now truthfully assure this Court that there is not a scintilla of competent evidence, either oral or documentary, in the record in this case to prove either (a) the existence of any valid lien on Debtor's property, or (b) the amount of any such supposed lien; and we ask this Court to verify the accuracy of this statement by itself examining the record citations upon which Respondents may try to rely, in the event that Respondents falsely repeat their contention previously made by them in the Court of Appeals that there is such valid evidence in this record.

In the event that Respondents should attempt to rely upon the foreclosure decree which was entered in the Nebraska State Court within four months of the institution of this bankruptcy proceeding, the trial judge correctly

held (R. 268) that: "No lien enforceable in this [bankruptcy] proceeding may rest alone on that [foreclosure] decree" (see also R. 235-6, 338). We also point out that the trial judge correctly held that this foreclosure decree which was entered in the District Court of Brown County, Nebraska, was not itself a *final decree,* because it was and still is subject to a timely "post decretal" motion filed by Petitioners to set it aside because of fraud practiced upon the state court in the foreclosure case, which motion the trial judge correctly found is still "pending, unheard and undetermined" in the Nebraska State Court (R. 202-4). Under the local law of Nebraska, no equity decree, such as the void foreclosure decree in question, is final and binding upon the Debtor so long as it is subject to being vacated in the trial court under Section 25-2001 of the Revised Statutes of Nebraska, or is subject to being reversed upon a trial *de novo* in the Supreme Court of Nebraska under Section 25-1925 of the Revised Statutes of Nebraska.* We need not bother to quote the Nebraska statutes cited above to this Court, unless Respondents erroneously contend that this foreclosure decree, which was entered on August 5 less than four months before October 22, 1954, when this bankruptcy case was originally instituted, has some effect to sustain an allowance of Respondents' Claim No. 5.

Needless to say, there are other important questions raised by this appeal, some of which involve Federal Bankruptcy law and others of which involve the local law of Nebraska. In view of what is said in this petition, however, it will not be necessary to burden this Court with

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* *Agnew* v. *Omaha National Bank,* 69 Neb. 654, 96 N.W. 189; *Smith* v. *Smith,* 2 Neb. Unof. 655, 89 N.W. 799; *Hansen* v. *Commonwealth Co.,* 174 Neb. 70, 115 N.W. (2d) 895; *Toelle* v. *Preuss,* 172 Neb. 239, 109 N.W. (2d) 293.

these questions, since the proper forum for their determination is obviously the District Court of Nebraska, to which this cause should be promptly returned by a reversal of the decision of the Court of Appeals for fundamental errors of Federal law.

The trial judge having abdicated his judicial function in violation of the Federal Constitution and the Federal Bankruptcy Act and applicable Federal law, thereby depriving Petitioners of due process of law and of their fundamental rights in a Court of Bankruptcy, and the Court of Appeals having likewise abdicated its judicial duty to pass upon this issue, which was so strongly presented to it by Petitioners, both before and after its opinion affirming the trial court's allowance of Respondents' Claim No. 5 was rendered, we respectfully ask this Court to reverse and remand this cause to the District Court.

CONCLUSION

Petitioners recognize that the granting of this Petition for Certiorari, as well as this Court's granting of Petitioner's petition in No. 1825 Miscellaneous, is discretionary with the Court, and that the granting of such writ and the allowance of such petition would not ordinarily result merely from error by either the District Court or the Court of Appeals *unless such error controverts fundamental Federal law.*

In the case at bar, however, the trial judge has entered a judgment which is not based upon his own judicial decision founded upon the record of this case, but is based solely upon "abstracts of title" to which he admits he obtained "temporary access" *outside of the courtroom,* and the nature and contents of which "abstracts of title" are totally unknown to Petitioners and could only be known to Respondents if it was they themselves, or their own

counsel, who furnished such "abstracts of title" to the trial judge *outside of the courtroom, after the trial was over.*

The Court of Appeals, in affirming the District Court's judgment without facing this crucial error, and in fallaciously assuming that there was valid evidence of the supposed mortgage notes, trust deeds and assignment agreements in the record, has likewise decided an important question of Federal law in a way which conflicts with innumerable decisions of this Court and of the other Courts of Appeal.

The violation of Federal law is therefore so plain and so undeniable in this case that Petitioners respectfully submit that this case calls for an exercise of this Court's power of supervision, and it is respectfully prayed that the Court should grant the prayer of the present petition accordingly.

PRAYER FOR PETITION FOR WRIT OF CERTIORARI.

Wherefore, Petitioners pray for the issuance of this Court's Writ of Certiorari to review and reverse the judgment of the United States Court of Appeals for the Eighth Circuit in the case of *"In the Matter of Black Ranches, Inc., a Nebraska corporation, Debtor; Roe R. Black, et al., Appellants vs. Paul Strand, et al., Appellees,"* No. 17990, reported in 362 Fed. (2) 8, and to remand this case to the District Court of Nebraska for further proceedings in that Court, to the end that Petitioners' constitutional and Federal rights herein claimed may be effectuated.

Respectfully submitted,

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APPENDIX I

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17,990

In the Matter of Black Ranches, Inc., a Nebraska Corporation, Debtor,

In Bankruptcy

Roe R. Black, Avis C. Black, Roe C. Black, Black Ranches, Inc., a Corporation, Debtor, and Thomas Hart Fisher,

Appellants,

v.

Paul Strand, Otto Lamprecht and Howard Thompson,

Appellees.

Appeal from the United States District Court for the District of Nebraska.

[May 12, 1966.]

Before MATTHES and GIBSON, Circuit Judges; HUNTER, District Judge.

MATTHES, Circuit Judge.

This is one of four appeals from orders of the United States District Court for the District of Nebraska, entered on December 4, 1964, allowing and disallowing claims in the Black Ranches, Inc., Chapter X Bankruptcy proceed-

ing.[1] All four appeals were submitted to this court March 8, 1966, on the printed record, briefs and oral arguments.[2] Judge Delehant, who presided over the trial of all of the claims which are the subject of these appeals, fully explored their merits and meticulously examined all of the contentions, as is demonstrated by his comprehensive memorandum opinion (unreported), filed on December 4, 1964, consisting of 274 typewritten pages, plus 75 footnotes, which, with deletions, comprises 269 printed pages of the record.

The basic issue for determination on this appeal, which involves claim No. 5, is whether the district court committed error in allowing it as a secured claim. Before consideration of this question, we give attention to background facts relevant to this and the other appeals. Black Ranches, Inc. (hereinafter sometimes referred to as "corporation" or "debtor"), was incorporated under the laws of Nebraska in August, 1949.[3] Shortly thereafter, Roe R. Black and Avis C. Black, husband and wife, became the record owners of all of the subscribed stock. In early 1952,

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[1] Apparently, there has not yet been any formal plan for reorganization submitted to, or approved by, the court. We speculate that this delay has been due to the necessity of first finally determining the number and amount of valid claims against the corporation.

[2] The pertinent parts of the original files, consisting of 10 volumes of pleadings, orders and memorandum opinions, have also been examined.

[3] The corporation was organized under the name of Palmer Ranches, Inc., in August, 1949. However, by an amendment to the Articles of Incorporation in September, 1949, the name was changed to Black Ranches, Inc.

the corporation was encountering financial problems. On approximately April 14, 1952, following meetings attended by some or all of the following persons: Roe R. Black, then the sole director and officer; one J. A. Cobbey; Marlon Brando (deceased since July 17, 1965); and, John M. Palmer, Black and his wife transferred all of their shares of stock to Cobbey. On the same day, Brando, Cobbey and Palmer were elected directors of the corporation and president, vice-president and treasurer, and secretary, respectively. The court found, however, and entered an order that (1) Cobbey is, and throughout the pendency of the Chapter X proceeding has been, the owner of record of all of the shares of stock, but owns, and has owned, such shares of stock solely as trustee, to enable him to negotiate for the adjustment of the indebtedness of the corporation with its several creditors; (2) the Blacks and Thomas Hart Fisher are the sole owners of the equitable, or beneficial, title to all of the shares of stock in the corporation; (3) as between the Blacks, on one hand, and Cobbey, on the other, the Blacks are entitled, in this proceeding, to represent the debtor. This finding of the court is not an issue in any of the appeals.

Black Ranches first acquired title to the ranch land in October, 1949. Thereafter, it conveyed the property to Kenneth Van Nostrand, who in turn conveyed it to Roe R. Black. On May 7, 1951, the latter deeded the land to Black Ranches, "subject to all liens of record". On May 10, 1951, Roe R. Black reported to the corporation that it was the owner of 8,280 acres.

The financial plight of the corporation worsened and, on October 22, 1954, five of its creditors filed a petition in the United States District Court for the District of Ne-

braska for corporate reorganization under Chapter X of the Bankruptcy Act (11 U.S.C. Chapter X, §501-676), praying, *inter alia,* for the appointment of a trustee for the corporation and its property.[4] On the day of its filing, the Court, Honorable James A. Donohoe (deceased since February 26, 1956), approved the petition for reorganization. This order was evidently regarded as permitting debtor to remain in possession of the ranch property. In any event, it was not until February 24, 1956, that Judge Delehant appointed Charles H. Rowan as a "limited" trustee to conserve the debtor's assets. On October 15, 1956, the court appointed Richard L. Berkheimer, an attorney, trustee for debtor and all of its property and assets. Rowan, upon filing of a satisfactory report, was discharged, and Berkheimer, having duly qualified, has been, and is, the trustee of debtor and its property.

Approximately 56 claims were filed. Of that number, 27 creditors failed to appear at the scheduled hearings. The court, finding that those creditors had abandoned their claims, disallowed them for "want of prosecution". Twenty-two claims have been allowed, all of which are

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[4] The petitioners were Rogers Grain and Feed Company, Hagel Lumber and Coal Company, Masters Lubritorium, Dwight Moody, and James M. Kennedy. One of the attorneys who represented the petitioners in the filing of the petition was Thomas H. Fisher, of 135 South La Salle Street, Chicago 3, Illinois. None of the petitioning creditors appears as a party to any of these four appeals. However, Thomas Hart Fisher is either an appellant or an appellee in each of the appeals. Thomas Hart Fisher filed a brief, as attorney for Black Ranches, Inc. and for himself, in cases Nos. 17,990 and 17,991 and appears "of counsel" in the brief of case No. 17,993. He was also the counsel who presented oral argument, for Black Ranches and himself, in all four appeals.

unsecured, except claim No. 5, the subject of this appeal.[5] The protracted litigation, which terminated in the district court on entry of orders on December 4, 1964, was focused upon the claims of the appellants herein and of Marlon Brando, Marlon Brando, Jr., Denver United States National Bank, Roe R. Black and Thomas Hart Fisher.

CLAIM NO. 5

The component parts of this claim, allowed in the sum of $95,107.73, are: (a) $69,913.72, due on a first mortgage; (b) $217.31, due on Nebraska State School land lease No. 67,550; (c) $51.70, for court costs incident to the foreclosure proceeding; and (d) $24,925, due on a second mortgage. Interest, at the appropriate rate, was allowed on each of the items, except the court costs. As security for $70,131.03 thereof, the court adjudged that appellees, as assignees, owned "the first and paramount mortgage lien" upon all of the owned ranch land of debtor in Brown and Blaine Counties, Nebraska, and upon the interest of debtor, as lessee, in Nebraska State School land lease No. 67,550. As security for $24,925 thereof, the court adjudged that appellees owned the second mortgage lien upon all of the owned ranch land of debtor in Brown and Blaine Counties, Nebraska.

Judge Delehant further found that, on March 5, 1951, Roe R. and Avis C. Black, the then owners of the ranch land, borrowed $70,000 from Union National Life Insurance Company, and, on the same date, executed their note for the amount of the loan, payable in annual installments, the final installment being due on January 1, 1973. The note bore interest at the rate of four per cent per annum,

[5] The record shows that 31 claims have been disallowed and 3 claims remain undetermined.

payable semi-annually. It further provided that all payments not made when due would bear interest from the due date at seven per cent per annum. The note also contained an acceleration clause which provided that, upon default in payment of any installment, the legal holder of the note could declare the whole debt immediately due and payable.

On the date of the note, as security for it, Roe R. and Avis C. Black executed a first mortgage on all of the ranch land. The mortgage was recorded in Blaine and Brown Counties, Nebraska, on March 27 and 28, 1951, respectively.

On August 14, 1952, default having occurred in the payment of an installment, debtor and Union National executed an extension agreement which provided that the unpaid principal of $70,000 would be payable in annual installments, commencing on January 1, 1953, and ending on January 1, 1975, with interest at the rate of four per cent payable semi-annually. The extension agreement expressly provided that it did not, in any manner, change the provisions of the note and mortgage, except as expressly set out and that all other provisions in the note and mortgage remained in full force and effect.

As additional security, debtor, then the owner of a leasehold interest in certain real estate in Brown County, Nebraska, executed and delivered to Union National a conditional assignment of school land lease No. 67,550. The assignment was duly recorded on November 3, 1952, and constituted a first lien on the leasehold interest.

On about April 6, 1951, Roe R. and Avis C. Black executed their promissory note to Dean Sack in the principal sum of $100,000, payable one year after date, with interest

at the rate of six per cent per annum from date, and at the rate of nine per cent per annum from the maturity of the note until paid. On the same date, as security, the Blacks gave their real estate mortgage upon the ranch land, subject to the prior mortgage held by Union National. The mortgage to Sack was filed for record on May 3 and May 17, 1951, in Brown and Blaine Counties, Nebraska, respectively. On September 11, 1952, an extension agreement was entered into between debtor and Sacks, which provided for the payment of the unpaid balance of the indebtedness in installments and also contained an acceleration clause.

On February 9, 1954, pursuant to the provisions of 1943 Rev. Stat. Neb. §§25-2137-25-2155, Union National instituted a proceeding in the District Court of Brown County, Nebraska, against Roe R. Black, Alvis C. Black, Black Ranches, Inc., Dean Sack, Marlon Brando, Jr., John Doe [Clarence O. Howell], and Mary Doe [Ada P. Howell] for the foreclosure of its mortgages. Marlon Brando was permitted to intervene. All of the defendants, except John Doe and Mary Doe, were represented by counsel and appeared in the foreclosure action. Sack filed a crossbill seeking foreclosure of his mortgage. The various filings and all proceedings in the action are fully detailed in Judge Delehant's opinion, and need not be recited here. On August 5, 1954, a decree was entered by the District Court of Brown County, Nebraska, finding that: (1) Union National was the owner of the note, mortgage and extension agreement, and, thereby, was the owner of the first lien upon all of the owned ranch land and upon the school land lease No. 67,550; (2) Dean Sack was the owner of the note, mortgage and extension agreement above referred to, and, thereby, was the owner of the second lien upon all of the ranch lands; (3) default had occurred in

the payment of the debts evidenced by the Union National and Sack notes and extension agreements; (4) Union National and Sack had declared such debts to be wholly due and payable; (5) there was due Union National $69,913.72, with interest from August 5, 1954, at seven per cent per annum, and due Sack $24,925, with interest from August 5, 1954, at eight per cent per annum; and (6) Union National and Sack were entitled to foreclosure of their liens. Foreclosure was adjudged.

There were post-decretal pleadings in the foreclosure action which delayed effectuation of the foreclosure decree and sale of property thereunder. When the reorganization petition was filed on October 22, 1954, the post-decretal filings had not been fully disposed of. By virtue of §148 of the Bankruptcy Act (11 U.S.C.A. §548),[6] the state court's decree of foreclosure has, therefore, been stayed.

On December 30, 1955, in consideration of the payment to Union National "of its first lien of $69,913.72 plus interest and costs", it sold, transferred and assigned to appellees all of its "right, title and interest" in the foreclosure decree and authorized the assignees to collect and enforce payment of the lien.

On January 3, 1956, Dean Sack sold, transferred and assigned to appellees his right, title and interest in the decree of foreclosure, the note, and the second mortgage. On the basis of those assignments appellees filed this claim.

Appellants advance several arguments to support their basic contention that the court erred in allowing claim

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[6] This section provides that an order approving a Chapter X proceeding "shall operate as a stay of a prior pending bankruptcy, mortgage foreclosure, or equity receivership proceeding, and of any act or other proceeding to enforce a lien against the debtor's property."

No. 5 as a valid secured claim upon debtor's real estate.[7] It is asserted that the liens of the mortgages were merged in the decree of foreclosure; that "Claim No. 5 rests solely upon whatever may be the judicial effect of the foreclosure decree itself, and that no claim is made by [appellees] to a lien based upon any note, mortgage, extension agreement or other contract, apart from such decree." Appellants couple with that assertion the fact that Judge Delehant found that debtor was continuously insolvent between April, 1952, and the inception of these proceedings on October 22, 1954. Therefore, appellants invoke §67(a)(1) of the Bankruptcy Act (11 U.S.C.A. §107(a)(1)), which provides, in pertinent part, that every lien "obtained by attachment, judgment, levy, or other legal or equitable process or proceedings within four months before the filing of a petition initiating a proceeding under this title by or against such person shall be deemed null and void (a) if at the time when such lien was obtained such person was insolvent or (b) if such lien was sought and permitted in fraud of the provisions of this title".

As we understand appellants' brief, their theory is that: the entry of the foreclosure decree effectively wiped out the two mortgage liens; the decree created another lien upon debtor's land; and, since this lien came into existence within four months of the filing of the petition for reorganization, it is barred by §67(a)(1), supra.

The contention finds no support in the statute, precedent, or common logic. It is beyond dispute that: (a) the re-

[7] As heretofore noted, of the unsecured creditors (approximately 18 in number) whose claims have been allowed (some for substantial amounts), only the parties designated as appellants in the caption of this case are complaining about the allowance of claim No. 5.

cording of the Union National and Sack mortgages created valid first and second liens upon the ranch land; and (b) the liens attached more than four months prior to the filing of the reorganization petition. A judicial foreclosure proceeding in Nebraska is not designed to remove the original mortgage lien and create a new and independent one.[8] Rather, the proceeding is required to effectuate a foreclosure and sale of the mortgaged property. Thus, in harmony with Judge Delehant's view, we conclude that the foreclosure decree under consideration did not destroy the liens of the two mortgages but merely judicially recognized them as a legal basis for the ultimate sale of the mortgaged land. It follows that the assignments in question carried with them, and transferred to appellees, the mortgage liens unaffected by the provisions of §67(a)(1). The early case of *Metcalf* v. *Barker*, 187 U.S. 165 (1902), is apposite to the question at hand. There, the court, in considering the predecessor to §67(a)(1), decided that the statute invalidated the "lien created by a levy, or a judgment, or an attachment, or otherwise," and that a "judgment or decree in enforcement of an otherwise valid preexisting lien is not the judgment denounced by the statute * * *." Id., 174. Accord: *Yumet & Co.* v. *Delgado*, 243 F. 519 (1 Cir. 1917), where an attachment lien obtained more than four months prior to bankruptcy was sustained, even though the subsequent judgment enforcing the lien was rendered within four mounths of bankruptcy; *Gatell* v. *Millian*, 2 F.2d 365 (1 Cir. 1924); *Morris W. Haft & Bros.* v. *Wells*, 93 F.2d 991 (10 Cir. 1937); *In re Van Meter*, 135 F.Supp. 781, 784 (W.D. Ark. 1955); 4 Collier on Bankruptcy, ¶67.04, p. 73, where the author, discussing §67(a)(1), states:

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[8] The statutory authority for judicial foreclosure of mortgages is found in §§ 25-2137, et seq., 1943 Rev. Stat. Neb., Reissue of 1964.

> "The crucial date at the other end of the period is that when the lien attaches, regardless of when the proceeding to enforce it is commenced, or when the judgment making it enforceable is entered."

Appellants also contend that there is no evidence *in this record* to show that debtor was ever indebted to Union National or Sack or that any such indebtedness was secured by mortgages on debtor's property. This assignment is utterly without substance.

The record, in context, demonstrates that the indebtedness was incurred in the amount evidenced by the notes, and that the first and second mortgages were executed contemporaneously with the notes and created liens upon debtor's land. In fact, since all of this was tacitly conceded in the foreclosure proceeding, in the petition for reorganization, in the objections to claim No. 5, and in the trial of that claim,[9] we have difficulty in comprehending

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[9] The five petitioning creditors, represented, as above noted, by Thomas H. Fisher, alleged, in part, that the liabilities of the debtor consist of [u]npaid first and second mortgages in the sums of approximately $70,000 and $25,000, respectively. * * * The cash on hand is insufficient to meet current liabilities and maturing interest and principal obligations on its first and second mortgages." It was further alleged that the foreclosure proceeding was pending in Brown County, Nebraska; that a "so-called" decree of foreclosure had been entered on August 5, 1954; that the foreclosure proceeding will continue to pend in said court until the sale of the mortgaged premises approximately nine months following the entry of decree of said foreclosure and in the month of May, 1955, subject to the proceedings in this court in this cause. * * * "By reason of the existing defaults, the holders of said first and second mortgages have exercised their rights to accelerate the maturity thereof, and the principal of said first and second mortgages is now due and payable."

Other allegations pertaining to the first and second mortgages appear in the petition, but need not be restated here.

this late attack upon the validity of the indebtedness and the liens created by the mortgages.

Appellants also assert that the foreclosure decree was fraudulently obtained by Brando and Cobbey and that Union National, Sack and Strand (one of the appellees) "participated in Brando's fraudulent project." The contention is rejected.

Although appellants' brief is replete with charges of fraudulent conduct on the part of appellees, the record is devoid of evidence, direct or circumstantial, to furnish support for the accusations. It appears that the objectors to claim No. 5 (appellants herein and others who have not appealed) did not, in their objections, as amended, directly, or by intimation, raise the issue of fraud on the part of appellees now so vociferously urged upon us. Neither does the record indicate that this issue was actually litigated. Although the court did not make an express finding that the foreclosure decree was not infected by any fraud, instigated or participated in by appellees, such determination is implicit in the court's findings and conclusions, and is supported by substantial evidence.

Appellants question the accuracy of the amount of interest allowed. They contend that the court erroneously: (a) compounded interest; (b) increased the interest rate of Union National's and Sack's notes from four per cent and six per cent, to seven and eight per cent, respectively; (c) allowed penalty interest; and (d) allowed interest on the claim after the Chapter X proceeding had been commenced.

The question of the allowance of interest on claims against debtors' estates was discussed in *Vanston Committee* v. *Green*, 329 U.S. 156 (1946), where the Supreme

Court noted that: "When and under what circumstances federal courts will allow interest on claims against debtors' estates being administered by them has long been decided by federal law. * * * The general rule in bankruptcy and in equity receivership has been that interest on the debtors' obligations ceases to accrue at the beginning of the proceedings." Id., 163. The court further observed, however, that "[s]imple interest on secured claims accruing after the petition was filed was denied *unless the security was worth more than the sum of principal and interest due.*" (Emphasis supplied). Citing *Sexton* v. *Dreyfus,* 219 U.S. 339 (1911). Id., 164.[10] See also, *In re Magnus Harmonica Corp.,* 262 F.2d 515 (3 Cir. 1958), where the court recognized that interest is ordinarily not recoverable after the date of institution of a Chapter X proceeding, but the rule need not apply when the creditor is secured above the amount of his principal debt; *Weeks* v. *McInnis,* 200 F.2d 611, 613 (6 Cir. 1953), cert. denied, 345 U.S. 958. And see, *Smith* v. *Robinson,* 343 F.2d 793, 800 (4 Cir. 1965), for a discussion of general principles regarding the allowance of interest.

Although the Union National note did not provide for compound interest, the state court, in decreeing the foreclosure, improperly allowed interest from January 1, 1954, to August 5, 1954, on $1,300, the amount of interest due on the unpaid principal on January 1, 1954, and determined that the amount due on this note, including the interest on interest, as of August 5, 1954, was $69,913.72. In his disposition of claim No. 5, Judge Delehant accepted the state court's determination, and allowed interest, at the stipulated rate of seven per cent, from August 5, 1954, on

[10] In *Vanston,* the Supreme Court disapproved the allowance of interest upon interest.

$69,913.72. It was error for the state court to compute the interest on the $1,300 in arriving at the total amount due, and Judge Delehant's allowance perpetuated that error. Therefore, the order should be, and is, modified by reducing the amount due, from $69,913.72 with interest, from August 5, 1954, at the rate of seven per cent, to $69,858.87 with interest, from August 5, 1954, at the rate of seven per cent. (The interest on $1,300 from January 1, 1954, to August 5, 1954, at the rate of seven per cent, amounts to $54.85).

In allowing post-petition interest, the district court did not limit the recovery thereof to the income from the securities or to the proceeds from the sale of the securities. Accordingly, the order of allowance is also modified to provide for the allowance of interest, at the specified rates, from October 22, 1954, until the consummation of a plan of reorganization, on condition, however, that recovery be limited to the income from the securities or from the proceeds of any sale thereof.

Appellants repeatedly characterize the increased rate of interest from maturity, for which the notes provided and which the court allowed, as a "penalty". Manifestly, appellants are attempting to bring this case within the rule that "A bankruptcy court is essentially a court of equity and will therefore not enforce a penalty." *In re Tastyeast, Inc.*, 126 F.2d 879, 881 (3 Cir. 1942), cert. denied, 316 U.S. 696. This case recognizes that: "[t]he question whether a contract to increase interest after default is an agreement to exact a penalty is one of state law and state policy." Id., 881-882. In the early cases of *Havemeyer* v. *Paul*, 45 Neb. 373, 63 N.W. 932, 937-938 (1895) and *Omaha Loan & Trust Co.* v. *Hanson*, 46 Neb.

870, 65 N.W. 1058 (1896), the Supreme Court of Nebraska decided that a higher lawful rate of interest from maturity provided for in a note or contract did not constitute a penalty. That holding has been followed. *Western Securities Co.* v. *Naughton,* 124 Neb. 702, 248 N.W. 56 (1933); *Moffit-Harrison Builders, Inc.* v. *Sandman;* 177 Neb. 425, 129 N.W.2d 524 (1964).

We recognize, of course, that there may be situations where the higher rate would produce an inequitable or unconscionable result, so as to require disallowance thereof. But we are not constrained on this record to upset Judge Delehant's conclusion that the increased stipulated rates are not entitled to recognition.

Appellants have presented other contentions directed to the amount in which claim No. 5 was allowed; the claimed right of debtor to reinstate that part of the loan which, assertedly, is not due until the year 1975; that appellees did not pay full value for the assignment of the Sack note, extension agreement and mortgage; and, finally, the asserted failure of the evidence to establish that there was a valid assignment of the Union National indebtedness to appellees. We have accorded each allegation of error careful consideration. As observed initially, Judge Delehant exhaustively examined all facets of the claim and considered every objection thereto. On this appeal, appelants have raised objections, which were not presented to the trial court. They have, nonetheless, been considered and found to be insufficient to justify us in interfering with the allowance of the claim, except in the two respects above mentioned.

OFFSETS AND COUNTERCLAIMS TO CLAIM NO. 5.

Appellants assert two "offsets and counterclaims" against the allowance of claim No. 5. They contend that, even if claim No. 5 is allowable, they are entitled to offset and counterclaim for "the fair and reasonable rental value of debtor's land or the net income" actually derived therefrom by Strand, while in possession between May 1, 1956, and April 30, 1960, whichever was higher, because (1) Strand was a mortgagee at the time he was in possession of debtor's land, or (2) "Strand voluntarily bought his supposed interests in the void forcelosure decree while debtor was not only insolvent, but in bankruptcy reorganization, and because Strand did not acquire possession of debtor's land in an open, fair and proper manner." Appellants also contend that they are entitled to an offset and counterclaim "for the sum of $7,380 as the fair and reasonable grazing fee due debtor from Strand for grazing his 615 cattle on debtor's land between mid-September and mid-December, 1955."

On March 8, 1956, Mr. Rowan, the first court-appointed "limited" trustee for the debtor, executed a "feeding privilege" agreement with Strand, effective until May 1, 1956. Thereafter, June 7, 1956, the court approved a written lease of debtor's land to Strand. The leasehold period was retroactive in part, running from May 1, 1956, to May 1, 1957, at a rental of $8,320. Pursuant to a petition of Trustee Berkheimer, Judge Delehant entered an order April 26, 1957, approving a second lease of debtor's land to appellees from May 1, 1957, to April 30, 1958, at a rental of $9,152. A third lease of debtor's land to appellees from May 1, 1958, to April 30, 1959, at a rental of $10,400 was subsequently approved by the court, after a

hearing. March 26, 1959, a fourth lease was submitted to the court. However, the court entered an order for competitive bidding on the lease, which was to run from May 1, 1959, to April 30, 1960. Roe R. Black and appellees both offered $10,500, and Judge Delehant approved the fourth lease to appellees at that rental. At a hearing on January 13, 1960, appellees bid $17,500 for the privilege of another lease, but were outbid by Mr. Garwood, whose lease at a rental of $18,000 from May 1, 1960, to April 30, 1961, was approved by the court. Following three additional leases for $16,370, $18,850 and $18,850 per year, respectively, the trustee was authorized to lease the land, from May 1, 1964, to April 30, 1965, for a rental of $20,000.

Appellants contend that appellees' total payment over the four years, from May 1, 1956, to April 30, 1960, amounting to $38,372, was far below the fair rental value of the land for those four years. Appellants rely primarily upon two computations to arithmetically support their claim. First, they assert that the $20,000 lease obtained in *1964* is reflective of the fair rental value of the land, and multiply that $20,000 by four year, period a claimed fair value of $80,000 for the four-year period during which appellees occupied the premises. The difference between $80,000 and the $38,372 actually paid by appelleees is claimed to be owing.

Alternatively, they claim that the reasonable rental value should be determined by accepting a grazing fee of $4 per head per month for each of the 1,000 cattle appellees kept on the ranch during the four years. The $4 per head per month figure is the amount charged to several cattle owners for grazing privileges in years prior to the filing of the petition for reorganization. If this were the reasonable rental value, it would mathematically total

$192,000 and appellees, according to appellants' theory, would be accountable for the difference between $192,000 and $38,372.

Judge Delehant concluded, and the evidence amply supports his finding, that the land had been over-grazed and worn out during the years preceding the reorganization proceeding and was not in perfect condition when first put under the trustee's control. Therefore, the figure of $4 per head per month obtained *prior* to bankruptcy is not indicative of the reasonable rental value at the time the leases were made by the trustee. Likewise, the rental value of the land in 1964 does not necessarily establish its worth in 1956, eight years earlier. No evidence appearing to the contrary, it must be presumed that the court approved agreements between Strand and the trustee provided for the fair and reasonable rental for each of the years in question. Appellants' unsupported intimation to the contrary does not merit further consideration.

Having alleged that Strand leased debtor's land for less than its reasonable value, as discussed, supra, appellants go on to claim that Strand, as a mortgagee in possession, had a duty to account for the higher of net income received or fair rental value. For the proposition that a mortgagee in possession has a duty to account, appellants cite a number of Nebraska cases. See, *Hays* v. *Christiansen,* 114 Neb. 764, 209 N.W. 609 (1926); *Hatch* v. *Falconer,* 67 Neb. 249, 93 N.W. 172 (1903); *Kemp* v. *Small,* 32 Neb. 318, 49 N.W. 169 (1891); *Felino* v. *Newcomb Lumber Co.,* 64 Neb. 335, 89 N.W. 755 (1902). However, appellants overlook the fact that the leases complained of were executed pursuant to §189 of the Bankruptcy Act, 11 U.S.C.A. §589, which provides:

> "A trustee or debtor in possession, upon authorization by the judge, shall operate the business and manage the property of the debtor during such period, limited or indefinite, as the judge may from time to time fix, and during such operation or management shall file reports thereof with the court at such intervals as the court may designate."

Judge Delehant properly concluded that appellants owed no duty to account, as they did not occupy the debtor's land in the posture of mortgagees in possession. On the contrary, he correctly found that "[i]n their use of the land, they were simple cash rent tenants under successive leases, executed by the trustees, and principally by the disinterested trustee, in pursuance of the orders, and with the express approval, of this court."

Appellants further assert that Strand had a duty to account, first, because he took possession while the debtor was insolvent and in bankruptcy reorganization and, second, because he did not acquire possession in an "open and fair" manner. The fact that Strand took possession by virtue of a lease from the trustee of a bankrupt in reorganization certainly does not obligate Strand under any bankruptcy provision, or other law, to account for anything more than the fair rental value under the lease. Nor do appellants cite any authority for their proposition. Appellants' second contention is patently untrue and there is not a shred of evidence in the record to support it.

Finally, appellants contend that the record discloses that Strand bought 615 head of Penny Poke cattle from the Brandos in September, 1955, did not remove them from the debtor's property until mid-December, 1955, and did not pay any grazing fee for the three months during which the cattle remained on the property. Appellants assert that, at a rate of $4 per head per month, $7,380, a

reasonable value for the grazing rights, should be set off against claim No. 5.

Appellants have misinterpreted the evidence. There was conflicting testimony as to when the sale took place. However, the bulk of references to the sale by Brando, Howell and Strand suggest that it occurred in mid-September, 1955, either the 15th or the 19th. Therefore, Judge Delehant's finding that the sale was made "under date of October 16, 1955, but possibly as early as September 19, 1955" was certainly supported by the evidence.

Summarized, the only evidence concerning the removal of the cattle was that they were mostly sold within two or three weeks, but that the last 50 to 100 head were removed by the end of November or the beginnning of December. There is *no* evidence in the record that more than 100 cattle were on the ranch for the entire three months and, in fact a fair inference from the testimony would be that considerably fewer than 100 remained by the end of November.

In view of these facts, as disclosed by the record and recognized by Judge Delehant, we cannot conclude that the court was erroneous in its finding that the cattle were removed from the debtor's ranch within a reasonable time after the sale and that no grazing fees were owing.

In summary, it is evident from a consideration of all the objections to the allowance of claim No. 5 and of the asserted offsets and counterclaims that the bulk of the issues raised by appellants presented fact questions. It is, of course, well established that our review of such questions is limited to a determination of whether the trial court's factual findings were clearly erroneous. F.R. Civ. P. 52(a); *Smith* v. *Robinson*, 343 F.2d 793, 795 (4

Cir. 1965); *Reserve Rural H. S. Dist. No. 4* v. *Hanika*, 339 F.2d 788, 791 (8 Cir. 1964); *Norris Dispensers, Inc.* v. *United States*, 325 F.2d 140, 141 (8 Cir. 1963).

Having carefully perused the entire record, with the exception of the two interest rate modifications discussed, supra, we have not only been unable to discover clear error in Judge Delehant's findings of fact, but have concluded that they are completely substantiated by the evidence. We are also satisfied that the ultimate judgment was not induced by a misconception of the applicable law.

As modified, the order and judgment is affirmed.

A true copy.

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No. 544

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

IN THE MATTER OF BLACK RANCHES, INC., A Nebraska Corporation, Debtor, in Corporate Reorganization Proceedings under Chapter X of the Federal Bankruptcy Act.

ROE R. BLACK, AVIS C. BLACK, ROE C. BLACK, BLACK RANCHES, INC., a corporation, Debtor, and THOMAS HART FISHER,

Petitioners,

vs.

ANNA C. BRANDO, as Administratrix of the Estate of MARLON BRANDO, SR., Deceased, and MARLON BRANDO, JR.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioners, Roe R. Black, Avis C. Black, Roe C. Black, Black Ranches, Inc., a corporation, Debtor, and Thomas Hart Fisher, respectfully pray this Court's writ of certiorari to review and reverse the decision of the United States Court of Appeals for the Eighth Circuit in this case,

and to remand the case to the District Court of the United States for the District of Nebraska for further proceedings in that court.

CITATION TO OPINIONS BELOW

The opinion and decision of the District Court of the United States for the District of Nebraska, insofar as Petitioners are informed, has never been officially reported.

The opinion and decision of the United States Court of Appeals for the Eighth Circuit in this case is reported in 362 Fed. (2d) 19, and is reprinted in full as Appendix I to this petition.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The opinion of the Court of Appeals was filed and its judgment rendered on May 12, 1966. Petitioners' petition for rehearing (with motions (1) that the language of the Court of Appeals' opinion be amended, and (2) that the Court of Appeals hear such petition and motion with such other judge or judges of some other United States Court of Appeals as might be designated by the United States Supreme Court) was denied without a supplemental opinion on June 21, 1966. This petition is filed within 90 days thereafter, in this Court.

This Court's jurisdiction is invoked under Section 1254(1) of the United States Judicial Code (U.S.C.A., Tit. 28, Sec. 1254(1)) which confers upon this Court jurisdiction to review decisions of the United States Courts of Appeals.

The United States District Court's jurisdiction was based upon the provisions of the Federal Bankruptcy Act (U.S.C.A., Title 11, Chap. 2, Section 2).

THE QUESTION PRESENTED FOR REVIEW.

The question for review is: Were Petitioners deprived of their rights under the Federal Bankruptcy Act because both the trial judge and the Court of Appeals held, in allowing Respondents' Claims Nos. 21, etc., in the amount of $110,117.40 as unsecured claims against the Debtor corporation, as well as in denying Petitioners' set-offs and counterclaims in the amount of $99,108.50 thereto, that Petitioners' objections, set-offs and counterclaims were in effect common law pleadings to such an extent that the failure of Petitioners to plead the defense of fraud in their objections to these Brando Claims Nos. 21, etc., as well as Petitioners' failure to plead a written contract signed by the Respondent Marlon Brando in Petitioners' set-offs and counterclaims to the Brando Claims Nos. 21, etc., prevented Petitioners from relying upon both said unpleaded defense of fraud and said unpleaded written contract, both of which were admittedly proven in this record.

Expressed in other words, the question here raised is whether Respondents' pleadings in the Bankruptcy Court prevented Respondents from relying upon proven fraud and a proven written contract signed by Respondent Marlon Brando, upon the theory that Respondents' pleadings are, like common law pleadings in a non-bankruptcy case, a limitation of the rights of the litigants, even though fraud on the part of the bankruptcy claimants (Brandos) was involved.

STATEMENT OF THE CASE.

This is a bankruptcy case which was instituted by five creditors against Black Ranches, Inc., a Nebraska corporation, under the corporate reorganization provisions of Chapter X of the Federal Bankruptcy Act, in the District Court of the United States for the District of Nebraska nearly twelve years ago on October 22, 1954. More than ten years later on December 4, 1964, the District Judge entered a judgment allowing Claims Nos. 21, etc., of Respondents against the Debtor as general unsecured claims in the amount of $110,117.40, and at the same time the District Judge denied and overruled Petitioners' set-offs and counterclaims in the amount of $99,108.50, upon the ground that Petitioners had not relied upon fraud in their objections to Claims Nos. 21, etc. and had not relied upon an express written contract signed by Respondent Marlon Brando in their set-offs and counterclaims thereto.

The primary question raised by the Brando Claims Nos. 21, etc., and by Respondents' set-offs and counterclaims thereto, is therefore whether under Federal bankruptcy law a bankrupt corporation's pleadings, *to-wit,* both its objections to creditors' claims and its set-offs and counterclaims thereto, are *in the nature of common law pleadings which limit the rights of the bankrupt corporation to the allegations of such objections, set-offs and counterclaims,* even though fraud on the part of the bankruptcy claimants is involved.

The holdings of both the trial judge and the Court of Appeals are summarized in the Appellate Court's opinion as follows (Appendix I, p. 24 below):

"In their objections to Brando's claims, appellants [Petitioners] alleged that the set-offs were due [the Debtor corporation]. The corporate resolution [a definite binding legal agreement signed by Brando], now so strenuously urged upon us, was not relied upon [in Petitioners' objections, set-offs and counterclaims] as a basis for the off-set, and Judge Delehant apparently viewed appellants' off-set as based on a *quantum meruit,* rather than an express contract, theory. *Having relied upon quantum meruit, appellants [Petitioners] cannot now switch their primary reliance to the corporate resolution [the signed agreement] and, thereby, to an express contract theory.* 'It is elementary that on appeal the appellant must adhere to the theory on which the case was tried in the lower court.' *Kirk* v. *St. Josephs Stock Yard Co.,* 206 Fed. (2d) 283, 287, and cases cited (8 Cir. 1953)." (Emphasis added.)

The first opportunity which Petitioners ever had to challenge the right of the trial judge to hold that they could not rely upon the defense of fraud to the Brando Claims Nos. 21, etc., in the amount of $110,117.40 and could not rely upon the signed Brando agreement in their set-offs and counterclaims, arose in the Court of Appeals, where this question was fully briefed and argued by Petitioners not only in their original briefs prior to the opinion and decision of that court, but also in Petitioners' Petition for Rehearing (and other relief) which they timely filed in the Court of Appeals after the decision and opinion had been rendered in that court affirming the trial court's judgment allowing Respondents' Claims Nos. 21, etc., in said amount of $110,117.40.

Petitioners have filed in this Court as No. 1825 Miscellaneous their "Motion for Leave to File Petition for Designation of at Least One Circuit Judge Now Sitting

on One of the United States Courts of Appeals for some Circuit Other Than the Eighth Circuit to Act Jointly with the Judges of the United States Court of Appeals for the Eighth Circuit in Passing Upon and Deciding the Petitions for Rehearing to be Filed by Petitioners as Appellants in Appeals Nos. 17990-1-2 in said Eighth Circuit Court."

Although said petition filed as No. 1825 Miscellaneous has not yet been ruled upon by this Court, Petitioners nevertheless desire to draw this Court's attention to such petition at this time, and to incorporate the same herein by reference thereto, since it is relevant to the issues raised by this Petition for Writ of Certiorari.

REASONS RELIED UPON FOR THE GRANTING OF THE WRIT.

It is a fundamental and well recognized principle of Federal Bankruptcy law that creditors' proofs of claim, on the one hand, and the objections, set-offs and counterclaims thereto of the Debtor corporation or its other creditors, on the other hand, *are not in the nature* of *common law pleadings which limit any of the litigants' rights,* especially where fraud on the part of the bankruptcy claimants is involved. *U. S.* v. *Duggan,* 210 Fed. (2d) 926 (8 CCA); *United Hotels Co.* v. *Mealey,* 147 Fed. (2d) 816 (2 CCA); *In re Annin & Co.,* 95 Fed. (2d) 381 (2 CCA); *Durrance* v. *Collier,* 81 Fed. (2d) 4 (5 CCA); *Horn* v. *Abts,* 19 Fed. (2d) 350 (8 CCA); *In re Germain,* 144 Fed. Supp. 678; *In re International Match Corp.,* 69 Fed. (2d) 73 (2 CCA).

On the contrary, under Federal bankruptcy law it is held that either a bankruptcy trustee or any other interested party has *the affirmative duty to defeat the allowance of fraudulent or improper claims against the bankrupt or its estate,* and by the same token the duty to assert the Debtor's set-offs and counterclaims thereto, *regardless of the form of the claim or the form of the objections, set-offs and counterclaims thereto. In re Brown,* 118 Fed. (2d) 198 (2 CCA); *In re Povill,* 105 Fed. (2d) (2 CCA); *B. F. Avery & Sons Co.* v. *Davis,* 192 Fed. (2d) 255 (5 CCA), cert. den. 342 U.S. 945; *Larcon Co.* v. *Wallingsford,* 136 F. Supp. 602; *American Anthracite etc. Coal Corp.* v. *Leonardo Arrivabene,* 280 Fed. (2d) 119 (2 CCA); *In re Woodmar Realty Co.,* 241 Fed. (2d) 768 (7 CCA).

It is unnecessary to add that there are other extremely important questions raised by this appeal which involve not only Federal bankruptcy law, but also the local law of Nebraska. However, it is not necessary for Petitioners to burden this Court with these other questions here, since the proper forum for their determination is obviously the District Court of Nebraska, to which this cause should be promptly returned by a reversal of the decision of the Court of Appeals for its fundamental error of Federal bankruptcy law.

CONCLUSION

Petitioners recognize that the granting of this Petition for Certiorari, as well as this Court's granting of Petitioners' petition in No. 1825 Miscellaneous, is discretionary with the Court, and that the granting of such writ and the allowance of such petition would not ordinarily result merely from error by either the District Court or the Court of Appeals, *unless such error controverts fundamental Federal law.*

However, in the case at bar both the trial judge and the Court of Appeals have rendered judicial decisions which violate a fundamental and well recognized principle of Federal bankruptcy law, by holding that a bankrupt corporation's responsive pleadings to creditors' claims are so much in the nature of common law pleadings as to deprive both the bankrupt corporation and other creditors of the relief to which they are plainly entitled on the record in the case, even though fraud on the part of the creditors as bankruptcy claimants has clearly been held to exist by the trial judge in this case. (See Court of Appeals'. Opinion, Appendix I).

The Court of Appeals in affirming the District Court's judgment upon the ground that the written agreement supporting Petitioners' set-offs and counterclaims in the

amount of $99,108,50, which was signed by Marlon Brando, is not binding upon him merely because it was not pleaded in the bankrupt corporation's set-offs and counterclaims to the Brando Claims Nos. 21, etc., has committed a flagrant violation of Federal bankruptcy law which clearly conflicts with applicable decisions not only of the Eighth Circuit Court of Appeals, but of the other Circuit Courts of Appeal as well.

This violation of Federal bankruptcy law is therefore so plain and so undeniable in this case that Petitioners respectfully submit that this case calls for an exercise of this Court's power of supervision, and it is therefore respectfully prayed that the Court should grant the prayer of the present petition accordingly.

PRAYER FOR PETITION FOR WRIT OF CERTIORARI.

Wherefore, Petitioners pray for the issuance of this Court's Writ of Certiorari to review and reverse the judgment of the United States Court of Appeals for the Eighth Circuit in the case of *"In the Matter of Black Ranches, Inc., a Nebraska corporation, Debtor; Roe R. Black, et al., Appellants, vs. Anna C. Brando, as Administratrix, etc., and Marlon Brando, Jr., Appellees,"* No. 17991, reported in 362 Fed. (2) 19, and to remand this case to the District Court of Nebraska for further proceedings in that Court, to the end that Petitioners' Federal rights herein claimed may be effectuated.

Respectfully submitted,

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APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

In Bankruptcy

In the Matter of Black Ranches, Inc., a Nebraska Corporation, Debtor,

No. 17,991

Roe R. Black, Avis C. Black, Roe C. Black, Black Ranches, Inc., a Corporation, Debtor, and Thomas Hart Fisher, Appellants,

v.

Anna C. Brando as Administratrix of the Estate of Marlon Brando, Sr.; and Marlon Brando, Jr.

Appellees.

No. 17,993

Marlon Brando, Jr., Appellant,

v.

Roe R. Black; Avis C. Black; Roe C. Black; Fred M. Nicholson, doing business as LaVernia Feed and Grain; R. D. Brown, R. A. Culpepper and G. W. Parker, a copartnership, doing business as Veterinary Service Institute; Black Ranches, Inc., a corporation, and Thomas Hart Fisher, Appellees.

(May 12, 1966.)

Appeals from the United States District Court for the District of Nebraska.

Before MATTHES and GIBSON, Circuit Judges; HUNTER, District Judge.

MATTHES, Circuit Judge.

These are two of the series of four appeals in the Black Ranches, Inc. Chapter X reorganization proceeding.

Before proceeding further, we are constrained to state the reason for the undue length of this opinion. The style of the opinion indicating two appeals is misleading. Eight distinct claims, which have given rise to numerous controversies, are involved and each of these claims constitutes, in effect, a separate appeal.

In case No. 17,991, appellants have appealed from the orders allowing: (a) claim No. 16, in favor of Marlon Brando, in the amount of $3,500; (b) claim No. 17, in favor of Marlon Brando, Jr., in the amount of $3,289.02; (c) claim No. 21, in favor of Marlon Brando, Jr., in the amount of $14,372.58; (d) claim No. 22, in favor of Marlon Brando, Jr., in the amount of $86,257.62; and (e) claim No. 23, in favor of Marlon Brando, in the amount of $2,698.18. All were allowed as general and unsecured claims.[1]

In case No. 17,993, Marlon Brando, Jr. has appealed from: (a) the order denying his claim No. 22 the status of a secured claim; (b) the order disallowing his claim No. 19, in the amount of $50,000; (c) the order disallowing his claim No. 20, in the amount of $17,500; (d) the order allowing claim No. 12 of Roe R. Black and claim No. 13 of

[1] Hereinafter, our use of the name "Brando" shall, unless otherwise indicated, refer to Marlon Brando. Black Ranches, Inc., the debtor corporation, will be referred to as "Black Ranches," "debtor" or "corporation".

Thomas Hart Fisher, Black's assignee, in the total amount of $78,641.75; and (e) the order refusing to subordinate claims Nos. 12 and 13 to any and all claims of Marlon Brando, Jr.

All of the presently contested claims emanate from complex facts having their setting in Black Ranches' distressed financial plight, which developed shortly after debtor's organization in 1949 and continued until this proceeding was instituted in 1954. The background facts discussed in appeal No. 17,990 (Black, et al. v. Strand, et al.) and additional operative facts particularly apropos to these appeals and to appeal No. 17,992 (Black, et al. v. Denver United States National Bank) aid a more comprehensive understanding of the numerous questions presented for our determination.

Roe R. and Avis C. Black, husband and wife, are the parents of Roe C. Black, who is also a party to all of the appeals.[2]

Roe R. Black and John M. Palmer have been acquaintances since 1930. They ventured into the cattle ranching business in 1947. From this beginning Black's ranching enterprise, consisting principally of providing pasture and care for cattle belonging to other parties, expanded until, in 1949, Black Ranches came into existence.

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[2] Roe C. Black has had a claim allowed in the sum of $2,027.14. LaVernia Feed and Grain and Veterinary Service Institute, appellees in No. 17,993, are holders of allowed claims for $1,004.78 and $1,186.84, respectively.

Marlon Brando was the father of Marlon Brando, Jr.[3] The latter was, during all relevant times, an actor in the motion picture industry. Penny Poke Ranch, Inc., was a corporation whose capital stock was owned by Brando, Jr. Apparently, Brando, Jr.'s ranching enterprise was pursued, in part, through this corporation. In 1948, Marlon Brando, Jr. decided to invest some of his available funds in the establishment of a breeding herd of cattle. That same year, cattle, constituting the beginning of what later became known as the "Penny Poke" herd, were acquired for him by his father. Pursuant to contractual arrangement, this "Penny Poke" herd, indisputably owned by Brando, Jr., eventually was kept and grazed on Black Ranches land.

On July 26, 1950, Brando, Jr. executed a power of attorney wherein he constituted his father his attorney in fact. Pursuant to that authority, Marlon Brando, represented his son in the many transactions involved in this litigation.

Jean A. Cobbey is a lawyer. He has been an acquaintance of John M. Palmer for many years and of Roe R. Black since 1948. Cobbey organized Black Ranches, Inc. at the behest of Palmer and Black. Cobbey was the attorney for Black Ranches for some time after its organization. Although he and Palmer were also directors and officers of the company for less than two years, Cobbey remained closely associated with Roe R. Black and Black Ranches.

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[3] Marlon Brando's death on July 17, 1965, has been suggested, and Anna C. Brando, "Administratrix of the Estate of Marlon Brando, Sr." has been substituted as a party in the proceedings in this court.

CLAIM NO. 22

In No. 17,991, appellants challenge the court's allowance of this claim in any amount, whereas, in No. 17,993, Brando, Jr. not only seeks to uphold the allowance, but contends that the court erred in not granting it the status of a secured claim.

The claim was based upon two promissory notes executed by Black Ranches, pursuant to the authority of its board of directors. One note, for $40,742.41, was dated October 1, 1952, payable to Brando, Jr. two years from date, and bore interest at six per cent per annum from date until maturity, and eight per cent per annum from maturity. This note was secured by a real estate mortgage of same date on the ranch land of debtor. The second note, dated July 2, 1953, for $36,761.01, was payable to Brando, Jr. two years after date, with interest from date at six per cent per annum until maturity, and eight per cent per annum thereafter. This note was also secured by a real estate mortgage on the ranch land of debtor. Thus, Brando, Jr. held third and fourth mortgages on the land (Union National and Sack held first and second mortgages. See, appeal 17,990). The District Court of Brown County, Nebraska, in the proceeding instituted by Union National, decreed that Brando, Jr. was the owner of the third and fourth mortgage liens upon the ranch land and further decreed foreclosure, as provided by law. Although Judge Delehant allowed claim No. 22 in the total sum of $86,257.62, which included the principal amount of the notes and accumulated interest to October 22, 1954, he declined to recognize the mortgages as valid liens, and consequently accorded the claim general and unsecured status. Neither of the parties is satisfied with the result.

A. APPEAL NO. 17,991.

In appeal No. 17,991, appellants assert that there is included, as a part of the allowance, the sum of $37,814.16 (with interest) on account of "winter feed expenses", and they contend this amount was incurred in caring for cattle owned by Penny Poke Ranch, the Brandos and other persons, was paid directly to third persons, and that debtor was in no way liable for this amount.

Manifestly, appellants' defense raised an issue of fact, which has been resolved against them. We unhesitatingly conclude that appellants have not sustained the burden of demonstrating that the court's findings (presumptively correct) are clearly erroneous.

To state the various facets of appellants' attack or to detail the pertinent evidence even superficially, would unnecessarily overburden this opinion. However, it is confidently stated that appellants' arguments have been examined and found lacking in factual support. Without further discussion, we dispose of the point by concurring in Judge Delehant's finding that:

> "The whole evidence * * * convinces * * * that the full sum of $77,503.42, represented in the two notes * * * was by Marlon Brando, Jr., the claimant, advanced and loaned to Black Ranches, Inc. in aid of the latter's operation of its business, and in varying amounts and at different times prior to the execution of the several notes. The objectors are quite unrealistic in their assertion that Marlon Brando, Jr. loaned or advanced the entire sum * * * to Marlon Brando, who thereupon applied it on his own account to the expenses of Black Ranches, Inc. * * *" The advancements "were expressly made for and in behalf of Marlon Brando, Jr. with the complete awareness of their source on the part of Black Ranches, Inc., and of no one on its behalf more surely than Roe R. Black. In

> that phase of the corporation's operations, Roe R. Black not only welcomed, but cultivated, the younger Brando as a very real, and probably the most promising, source of financial assistance in a persisting economic crisis. Marlon Brando, Jr., as has already been observed, was then in affluent circumstances, thanks to his profitable employment in his theatrical calling. No one else connected with Black Ranches, Inc. was even comparably as well circumstanced in a financial way."

Appellants next assert that the two promissory notes to Brando, Jr. "were invalid because they were issued by Debtor as a part of the fraudulent scheme of Brando and Cobbey to create fraudulent claims against Debtor in breach of their fiduciary obligations to Debtor." It is, perhaps, appropriate to recall basic legal principles applicable to resolution of this contention. Under normal circumstances, the law presumes good faith and honesty. As a corollary, the general rule is that fraud will not be presumed, but must be proved by the party asserting it. 24 Am.Jur., Fraud & Deceit, §§ 255-256; *United States* v. *Wunderlich,* 342 U.S. 98, 100 (1951); *Lessmann* v. *C.I.R.,* 327 F.2d 990 (8 Cir. 1964); *Reeves* v. *United States,* 168 F.Supp. 720 (D.C. Neb. 1958).

Appellants enthusiastically state that Judge Delehant found "in the clearest possible terms that Cobbey and Brando had formulated in mid-April, 1952, a fraudulent scheme * * * for Brando's 'ultimate acquisition for the benefit of himself and Marlon Brando, Jr. of the ranching enterprise of Black Ranches, Inc., including, eventually, its ranch land and other property, and its operations in the way of "ranching cattle"' ". The statement just quoted is, in large part, the product of the author of the brief and the quotes therein extracted from Judge Delehant's opinion were taken out of context. Appellants climax their as-

sertions in regard to the claimed fraudulent scheme with the statement: "Thus Judge Delehant found IN SO MANY WORDS that the two notes in question, as well as the mortgages securing them, were made as part and parcel of the Brando-Cobbey fraudulent 'design' or 'project.'" Appellants do not cite us to the part of Judge Delehant's opinion where the last quoted avowed finding appears. The unvarnished fact is that Judge Delehant found (p. 263 of the printed record):

> "Thus construed, the court holds that the notes themselves, and each of them, are invulnerable to the attack made upon them. The advancements underlying the several notes were made, *supra*. Thereby, the debt evidenced by each note was created. To borrow a celebrated phrase, Black Ranches, Inc. had 'hired the money.' *There was no illegality, wrongdoing, overreaching or dishonesty in the giving of promissory notes evidencing the debts, and providing a later time for the payment of each note, and for the payment of lawful interest pending such payment.* Marlon Brando, Jr. might conceivably have grounds for complaint against Marlon Brando for the advancement of his funds for the benefit of Black Ranches, Inc. *But Black Ranches, Inc., having received the benefit of the advancement simply owed—and owes—the debt* resulting therefrom." (Emphasis supplied).

A brief resume of the evidence upon which appellants rest their claim of a fraudulent scheme is pertinent at this point. Roe R. Black, Palmer and Cobbey constituted the first board of directors and the first president, vice-president and treasurer, and secretary, respectively, of Black Ranches.[4] They served in those capacities from October

[4] They were so designated at shareholders' and directors' meetings held on October 13, 1949.

13, 1949, until May 10, 1951, when, at a special meeting of the board of directors, Cobbey resigned as director and secretary, and Palmer resigned as vice-president and treasurer. Roe R. Black was then elected treasurer and retained his office as president. On December 15, 1951, Palmer resigned as director. As a consequence, Black was the sole remaining director, as well as president and treasurer of Black Ranches from December 15, 1951.

In the early part of 1952, Black Ranches was confronted with pressing financial problems. The first and second mortgages, constituting liens in the principal amount of approximately $110,000, were in default. Denver National Bank, a large secured creditor, and other creditors were demanding payment or settlement of their claims. The corporation was without operating funds and Black, who, with his wife, owned all of the stock and was then the sole director and officer, was experiencing difficulty in obtaining additional financing for the corporation. Corporate bankruptcy seemed imminent. It was in this setting that Black turned to Cobbey for assistance in the early part of April, 1952. Cobbey in turn, enlisted the aid of Palmer and Brando. Thereafter, on about April 14, 1952, Roe R. and Avis C. Black executed and delivered to Cobbey transfers of all of their stock (as noted in our opinion in No. 17,990, the court found that Cobbey held the stock in trust); at about the same time Brando signified his willingness to assist Cobbey in the latter's attempt to rehabilitate and stabilize Black Ranches; on April 14, 1952, at a shareholders' meeting, Cobbey (then the sole holder of the stock), Brando and Palmer were elected as directors of the corporation. On the same day the directors elected Brando, Cobbey and Palmer as president, vice-president and treasurer, and secretary, respectively; on April 21,

1952, Cobbey and Brando executed an agreement, designated in the record as Exhibit 69;[5] after April 15, 1952, Brando acted both as president and as general manager of Black Ranches;[6] on April 7, 1953, Brando and Palmer were, at their request, relieved of their duties as directors and officers of the corporation.

Brando's entry into the picture and his subsequent efforts furnished temporary relief from the debtor's financial plight. A substantial amount of Brando, Jr.'s money

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[5] This agreement recited that Brando was one of the corporation's principal creditors; that Cobbey held the stock of the corporation for the purpose of conserving its assets; that if the debts of the corporation were paid in full by April 15, 1954, through the efforts of Roe R. Byack, he would receive 51% of the stock and Brando 49% thereof; that if the debts were paid by April 15, 1955, through the efforts of Black or Brando, Brando would receive 51% and Black 49% of the stock; that if debts were settled "to the total amount of $230,000" Cobbey would give from 51% to 100% of the stock to Brando, or to such persons as agreed upon by Cobbey, Brando and Palmer. Brando agreed to devote the major portion of his time to Black Ranches; to bend every effort to the refinancing of the mortgage indebtedness; to retire the corporation's bank indebtedness; and to conduct the affairs of the corporation in a profitable manner. The parties further agreed that, for the purposes of the contract, the value of the ranch was $230,000. There was a final provision that, if the mortgage indebtedness was not refinanced, the general creditors held in abeyance, and expenses kept current after April 15, 1952, the agreement would be void. Judge Delehant found that the agreement was never carried into effect, either entirely or in part, and that late in June or early July, 1953, Cobbey and Brando agreed that, "because of its inoperability", it be wholly abandoned. The Judge, nevertheless, considered the agreement in determining the legal effect of the mortgages given to secure claim No. 22.

[6] Brando continued as manager of Black Ranches until January 1, 1955, when he resigned.

was used to defray payments on the first and second mortgages. Through Brando, Jr.'s financial assistance Brando, then manager, was able to continue the ranch operations. In May, 1952, the Brandos also guaranteed payment of the Black Ranch debt to Denver United States National Bank. In short, Brando, Jr. proved to be a financial benefactor of the corporation, which, but for such aid, would probably have collapsed.

It is, of course, true that the note of October 22, 1952, given Brando, Jr., was executed by the corporation pursuant to authority of the board of which Brando was a member, at a time when he was also president and general manager. Brando was, at the same time, acting as attorney in fact for his son pursuant to the power of attorney, supra. The second note of July 2, 1953, given Brando, Jr. was executed pursuant to authority of the board, which was then composed of Cobbey and two of his office associates. It is also true that Judge Delehant refused to accord validity to the third and fourth mortgages given by the corporation as security for the two notes, because of a breach of Brando's fiduciary responsibilities. But, contrary to appellants' contention, such factors do not *compel* invalidation of the notes.

Not only did the notes constitute prima facie obligations of the corporation, but Judge Delehant found "that the debts for which the two notes involved in claim No. 22 were given, were and are validly created for good and full consideration, and constitute lawful obligations of Black Ranches, Inc., for which the giving of the notes alone was and is uncensurable and valid." As the reviewing court, we are not at liberty to set aside the court's finding as "clearly erroneous", unless, on consideration of the entire evidence we are left with the definite and firm conviction

that a mistake has been committed. *United States* v. *Gypsum Co.*, 333 U.S. 364, 395 (1948). We are not so convinced.

Appellants advance other reasons to support their proposition that the claim should not have been allowed in any amount. Thus, they argue that the Brando-Cobbey contract of April 21, 1952, Exhibit No. 69 (supra), was a third party contract under which Brando personally agreed to hold debtor harmless from all sums thereafter expended by the Brandos in conducting cattle ranching operations. They also contend that the notes are invalid because they were given for a past consideration, at times when debtor was insolvent. These, and other attacks upon claim No. 22, were considered at length by Judge Delehant, who ruled, in effect, that the claim was invulnerable to all assaults. We too have pondered all questions raised by appellants and are convinced that Judge Delehant reached a proper result in allowing the claim, and we affirm his order in that respect.

B. APPEAL NO. 17,993.

Brando, Jr. contends that the district court erred in failing to allow his claim No. 22, as a secured claim, prior to all other claims except claim No. 5. The crucial question is whether the third and fourth mortgages, given to Brando, Jr. as security for the notes, constituted enforceable liens upon the debtor's property.

Characteristically, the court meticulously analyzed the facts and circumstances surrounding the giving of these mortgages. Judge Delehant pinpointed the undisputed evidence showing: (a) the financial plight of debtor in April, 1952, and thereafter; (b) Cobbey's holding, as trustee, of all of the stock; (c) the personnel of the board and

the corporate officers after April, 1952, (Cobbey, Brando and Palmer, directors—Brando, president and manager); (d) the agreement between Cobbey and Brando (Exhibit 69, supra); (e) the status on October 1, 1952, and on October 22, 1952, of Brando as director, president and manager, and the status of Brando as manager on July 2, 1953; (f) Brando's "entertainment and his discussion * * * of an imprecise project for the eventual 'taking over' for himself and Marlon Brando, Jr. of the property and operations of Black Ranches, Inc." and Cobbey's knowledge of that contemplated project; and (g) the directors' meeting on October 22, 1952, and July 2, 1953, directing the execution of the mortgages.

After adverting to the foregoing significant circumstances, and "especially the trust and confidence reposed in, and the responsibilities by law imposed upon, J. A. Cobbey and Marlon Brando, in favor, and for the benefit, of all of the creditors, secured and unsecured, and also for the benefit of the equitable owners of the capital stock, of Black Ranches, Inc.," the court found that the action taken by the corporate directors and officers, "in approving and directing the execution and delivery and in the ensuing actual execution and delivery, of the third mortgage under date of October 1, 1952, and of the fourth mortgage under date of July 2, 1953, and each item of such action, constituted, and was taken, in violation of the trust and confidence, and of the fiduciary duties, by law imposed upon such directors and officers. And to that extent, the court finds and concludes that such action was and is invalid and ineffective."

Judge Delehant expanded upon the foregoing conclusions by observing that: "They [Cobbey and Brando] were obliged to recognize and respect priorities as between creditors that had validly and inflexibly attached; but it

was beyond their right to create priorities as between creditors with a manifest view to the preference of the recipients of such priorities. And the creation of such a priority was not alone the consequence, but also the inescapable purpose, of the execution of each of the two mortgages involved in Claim No. 22. * * * They are likewise demonstrative of an attitude that is irreconcilable with the duties of a 'faithful steward.'"

Consideration was also accorded to Brando, Jr.'s argument that he had no "formal knowledge" of his father's course of conduct and should not be accountable therefor. The court's view was: "[h]owever, in this claim, Marlon Brando, Jr. is the moving party; he undertakes to hold fast to the position which his acknowledged agent attempted by the two mortgages to obtain for him. In that effort he must suffer the infirmities of the agent's conduct. What Marlon Brando did, Marlon Brando, Jr. must be held to have done."

Brando, Jr. contends that there is no evidence to bring the giving of the two mortgages within the contemplation of the rule which prohibits, under some circumstances, the giving of security to one in a fiduciary relationship. Cases from Nebraska state courts and other jurisdictions are relied upon. We do not regard such authorities as apposite.

It is firmly established that a reorganization court, as a court of bankruptcy, has the jurisdiction and powers of a court of equity. 6 Collier on Bankruptcy, ¶317, p. 657, pertinently observes: "But § 155 [Chapter X Bankruptcy Act] gilds the lily further by providing:

> "Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the pow-

> ers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they matured.' "

This principle has judicial sanction. In the landmark case of *Pepper* v. *Litton,* 308 U.S. 295, 303, 304 (1939), the court stated:

> "Courts of bankruptcy are constituted by §§ 1 and 2 of the Bankruptcy Act (30 Stat. 544) and by the latter section are invested 'with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings.' Consequently this Court has held that for many purposes 'courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity.' * * * Among the granted powers are the allowance and disallowance of claims; the collection and distribution of the estates of bankrupts and the determination of controversies in relation thereto; the rejection in whole or in part 'according to the equities of the case' of claims previously allowed; and the entering of such judgments 'as may be necessary for the enforcement of the provisions' of the Act."

See also, *In re Keystone Realty Holding Company,* 117 F.2d 1003, 1006 (3 Cir. 1941).

It cannot be gainsaid that Brando and Cobbey, as directors and officers, were fiduciaries. *Pepper,* supra, at p. 306, teaches:

> "A director is a fiduciary. *Twin-Lick Oil Co.* v. *Marbury,* 91 U.S. 587, 588. So is a dominant or controlling stockholder or group of stockholders. *Southern Pacific Co.* v. *Bogert,* 250 U.S. 483, 492. Their powers are powers in trust. See *Jackson* v. *Ludeling,* 21 Wall. 616, 624. Their dealings with the corporation are subjected to rigorous scrutiny and where any of their

> contracts or engagements with the corporation is challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein."

Regardless of the motives of Brando, the fact remains that his participation, as an officer of debtor, in the giving of the mortgages, must be scrutinized and judged by the standards stated, supra. So viewing the matter, we conclude that Judge Delehant reached a fair and just result, and his order denying claim No. 22 the status of a secured claim is affirmed.

CLAIMS NOS. 16 *AND* 17
APPEAL NO. 17,991.

Brando sought allowance of claim No. 16 in the amount of $37,379.35, plus interest at six per cent, from July 1, 1954. The court allowed it in the amount of $3,500, as a general and unsecured claim. Brando, Jr.'s claim No. 17 was allowed in the sum of $3,289.02. Appellants seek reversal of both allowances.

Studious examination of the claims, objections thereto, the pertinent evidence, and the contentions of appellants satisfies us that Black Ranches owed both claimants the amounts allowed. We affirm, on the basis of the district court's opinion.

CLAIM NO. 21
APPEAL NO. 17,991.

This claim was allowed as a general and unsecured claim in favor of Brando, Jr. in the sum of $14,372.58. Appellants advance numerous arguments to support their contention that the court's order should be reversed.

The operative facts are centered on transactions between: Roe R. Black, Black Ranches, and Denver United States National Bank (formerly Denver National Bank and here-

inafter referred to as Denver Bank); and the Brandos, Penny Poke and the Denver Bank. (These facts also have relevance to appeal No. 17,992, *Black, et al.* v. *Denver United States National Bank,* decided contemporaneously). During the winter of 1950-51, Roe R. Black was engaged, individually, and on behalf of Black Ranches, in the acquiring, caring for, feeding and the sale of cattle owned, or ultimately to be owned, by other persons, under an arrangement whereby the owners were to bear the costs of such care and feeding. Lacking capital to finance the enterprise, Black succeeded, in early 1951, in establishing a line of credit for himself and Black Ranches with the Denver Bank. Pursuant to an arrangement, Black, individually, and as president of Black Ranches, signed a number of blank promissory notes and chattel mortgages and authorized the Denver Bank to complete execution of the instruments, as the requirements for money arose, by including the appropriate amounts in the notes and the number and description of the cattle in the chattel mortgages. From time to time, as the need arose, Denver Bank did complete the notes and chattel mortgages and simultaneously deposit in the account of Black Ranches, or disburse for its benefit, the amount represented by each note and chattel mortgage. No suggestion is made that Denver Bank, in any manner, violated any confidence reposed in it.

Between March 5, 1951, and May 10, 1951, Denver Bank had made advances to Black and Black Ranches (hereinafter sometimes collectively referred to as Black), totaling $176,983.31, and held Black's notes and chattel mortgages evidencing this indebtedness. All of the notes and mortgages were to mature on January 2, 1952. On October 19, 1951, Denver Bank consolidated the amounts previously lent into one note and chattel mortgage and, in accordance with the agreement, used one of the blank notes and

mortgages that had been previously executed. This note, in the principal sum of $192,222.68, provided for interest at six per cent per annum from date, and was composed of the following items:

Prior principal advances,	$176,983.31
Interest at six per cent from date of advances to October 19, 1951,	5,489.37
Cash advanced on October 9, 1951, to Black Ranches,	9,750.00
Total,	$192,222.68

Subsequent payments reduced the principal amount due on this "consolidated" note to $126,144.70 as of April 1, 1952, which, with accrued interest, amounted to $130,763.06 then due Denver Bank.

Denver Bank, also held two notes secured by chattel mortgages executed by the Brandos and Penny Poke Ranch, evidencing amounts borrowed for use in "Penny Poke" "cattle ranching" operations. The unpaid balance of the principal, on January 15, 1952, the maturity date, was $47,500. These two notes were in default and Denver Bank was pressing for their payment, as well as for payment of the balance due on the indebtedness of Black and Black Ranches. In order to prevent foreclosure of the Black chattel mortgages, which would probably have precipitated bankruptcy proceedings against Black Ranches, the Brandos and Penny Poke, on May 27, 1952, entered into an "Extension Agreement and Guaranty" with Denver Bank. In summary, the agreement provided: (1) Brandos and Penny Poke were indebted to Denver Bank in the sum of $47,500, with interest from January 15, 1952, evidenced by two notes and chattel mortgages on Brandos and Penny Poke livestock; (2) Black and Black Ranches

were indebted to Denver Bank on April 1, 1952, in the amount of $130,763.06, with interest from that date at six per cent per annum, as evidenced by the October 19, 1951, note and chattel mortgage on livestock; (3) Brando had taken over the management of Black Ranches, under arrangement with Black and Black Ranches, for the purpose of operating it and liquidating its debts in an orderly manner; and Brandos and Penny Poke desired "the Bank to extend the maturities of, and to forbear from foreclosure of the security for, both the Black debt and the Penny Poke debt in order to permit the orderly liquidation thereof"; (4) Brandos and Penny Poke guaranteed payment at maturity of the balance due on October 19, 1951, on the Black note; (5) in case of default in payment at maturity of the Black note, Brandos and Penny Poke promised to pay the same; (6) to secure the performance "of this Guaranty" Brandos and Penny Poke "delivered, transferred, assigned and pledged" to Denver Bank by chattel mortgage "of even date herewith" all livestock owned by Penny Poke.

The Black note was not fully paid, and on February 1, 1955, Denver Bank instituted an action in the District Court of Lancaster County, Nebraska, against the Brandos and Penny Poke, on the guaranty agreement of May 27, 1952, and sought judgment for $23,861.43, alleged to be the balance of principal and interest due on the Black note. The suit was settled on December 1, 1955, by execution of a settlement agreement, and a note by the Brandos and Penny Poke payable to Denver Bank in the sum of $14,372.58, with interest from date at six per cent per annum. On March 1, 1956, and on May 3, 1956, Brando, Jr. made payments of $7,391.29 and $7,296.89, respectively, (aggregating $14,688.18 principal and interest due) to Denver Bank. The amount so paid liquidated the balance of

the principal and a portion of the interest due on the Black note. Upon such payment Denver Bank delivered the Black note to Brando, Jr. for use in connection with filing of his claim No. 21.

The basic question for determination is the nature of Brando, Jr.'s obligation to Denver Bank; i.e., whether he was, as contended by appellants, primarily responsible for the payment of the entire Black debt, or whether as contended by Brando Jr. he was liable only as a guarantor, by virtue of the guaranty agreement.

The district court held that Brando, Jr.'s obligation stemmed from the guaranty agreement and that "his obligation was as a guarantor or surety for a debt, whose principal obligors were Roe R. Black and Black Ranches, Inc." Its holding was summed up in these words: "The contention that Marlon Brando, Jr. was the principal obligor for the debt of Roe R. Black and Black Ranches, Inc. to the Denver National Bank—or any part of it—is completely without merit or support".

The law of guaranty, in its general aspects, is set forth in 24 Am.Jur., Guaranty, § 2, in this language:

> "The contract of guaranty is an undertaking or promise on the part of one person which is collateral to a primary or principal obligation on the part of another, and which binds the obligor to performance in the event of nonperformance by such other, the latter being bound to perform primarily. An approved definition of 'guaranty' is 'a promise to answer for the debt, default, or miscarriage of another person.'"

Accord: 38 C.J.S., Guaranty, § 1; *In re Williams' Estate*, 26 N.W.2d 847 (Neb. 1947). Appellants' arguments, which have been fully explored, fail to persuade us that Marlon Brando, Jr. was primarily obligated at any time to pay the

amount due Denver Bank on the Black note of October 19, 1951, executed by Black and Black Ranches. It defies logic to assert, as appellants in effect do, that Roe R. Black, individually, and for Black Ranches, was moved by altruism to obligate himself and his corporation, in an amount exceeding $192,000, for debts of the Brandos, Penny Poke and others. Quite to the contrary, as Judge Delehant found, Black was motivated to execute the note by the profits which he anticipated would result from the ranching enterprise. To be sure, the Brandos and Penny Poke had a stake in the maintenance of Black Ranches as an operative concern. But neither this factor nor others affected the respective legal responsibilities of the parties. Brando, Jr. was not legally bound to discharge any part of the Black debt until he executed the guaranty agreement which, by its clear and unequivocal terms, imposed upon him only the obligation to answer for the default of Black and Black Ranches.

Neither is the court's order allowing the claim invulnerable on the ground that the doctrine of subrogation does not apply.

> "Subrogation is a salutary, equitable remedy, conceived in justice * * *. 'The doctrine * * * is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice, and to do equity in the particular care under consideration. It does not rest on contract, and no general rule can be laid down which will afford a test in all cases for its application. Whether the doctrine is applicable to any particular case depends upon the peculiar facts and circumstances of such case.'" *Equitable Life Assur. Soc.* v. *Person*, 284 N.W. 260, 263-264 (Neb. 1939).

See also, *State* v. *Citizens' State Bank*, 224 N.W. 868 (Neb. 1929). The doctrine may be invoked by the guarantor if

the principal debtor has defaulted in the payment of his obligation and the creditor has enforced the contract of guaranty. The debtor's obligation to pay the debt is not extinguished by the guarantor's payment thereof. 24 Am. Jur., Guaranty, § 125, pp. 955-956. See, *Howell* v. *Commissioner of Internal Revenue*, 69 F.2d 447, 451 (8 Cir. 1934), cert. denied, 292 U.S. 654.

We are mindful of appellants' submission that (a) the guaranty agreement did not provide for subrogation; (b) Brando, Jr. was a mere volunteer; and (c) Brando "arranged the Penny Poke-Brando guaranty to further the Brando-Cobbey fraudulent scheme or 'project' to fleece debtor of its property". As previously stated, subrogation does not rest on contract. Contentions (b) and (c) are without factual support. We approve the court's action and affirm the allowance of claim No. 21.

CLAIM NO. 23

This claim of Marlon Brando was allowed in the amount of $2,698.18. The asserted consideration for the debt was the furnishing of repairs to buildings located upon debtor's real estate. In the foreclosure action (discussed in appeal No. 17,990, *Black, et al.* v. *Strand, et al.*), the District Court of Brown County, Nebraska, decreed that Brando held a mechanic's lien upon the buildings and real estate of debtor, as security for the amount due him, and was entitled to enforcement of the lien. After due consideration, Judge Delehant concluded that there was no evidentiary basis for according the claim preferred status and allowed it as a general unsecured claim.

The sole question before us is whether, as Judge Delehant found, Black Ranches was indebted to Brando. The controversy presented only a fact question. We have

surveyed the evidence and are convinced that Judge Delehant's finding is supported by substantial evidence and is not clearly erroneous. The order is affirmed.

SETOFFS AND COUNTERCLAIMS TO BRANDO CLAIMS

Appellants assert that they are entitled to setoff against Brando claims 16, 17, 21, 22 and 23, the following: (1) additional grazing fees for grown Penny Poke cattle, of $1 per head per month from April, 1952, to September, 1955, totalling $16,108.50; (2) grazing charges for "weaned" Penny Poke cattle from April, 1952, to September, 1955, at the rate of $4 per head per month, totaling $20,112; (3) grazing fees for 500 grown Brando cattle[7] from April, 1952, to September, 1955, at the rate of $4 per head per month, totaling $56,000; (4) grazing fees for weaned progeny of the 500 Brando cattle from April, 1952, to September, 1955, at the rate of $4 per head per month, totaling $6,888; (5) additional costs for winter feed for grown Penny Poke cattle from April, 1952, to September, 1955, totaling $10,998.61; (6) the cost of winter feed "for Brando's 500 cattle and the weaned progeny of both the Penny Poke and Brando 500 cattle" from April, 1952, to September, 1955, totaling $20,837.13; (7) "the profits and avails which Penny Poke Ranch, Inc., Marlon Brando, Jr., and Marlon Brando derived from grazing their cattle on Debtor's land between April 15, 1952, and September 15, 1955", totaling $131,834.73; (8) $21,261.22 of the "$62,500 purchase price of Brando's 500

[7] "500 Brando cattle", or "Brando 500 cattle" refers to those cattle which were to be purchased by Black for Brando, in accordance with the contract dated July 26, 1950. This contract is more fully discussed, *infra*.

cattle which debtor borrowed and later repaid Denver National Bank under Debtor's $192,222.68 chattel mortgage note"; and (9) any amount "Debtor may be required to pay Denver National Bank under claim No. 32", possibly totaling $7,488.90. The sum of debtor's claims on the setoffs is $291,529.09, with interest claimed at the rate of six per cent per annum.[8]

For their proposition that the first two-setoffs, *supra*, should be allowed, appellants rely primarily on a unanimously adopted corporate resolution of May 8, 1952, reading as follows: "that as of April 15, 1952, Penny Poke Ranch (a corporation whose capital stock was owned by Marlon Brando, Jr.) and Marlon Brando and Marlon Brando, Jr., shall pay Black Ranches, Inc. $4 per head per month for each weaned animal, plus any additional feed Black Ranches, Inc. is required to purchase on behalf of said Penny Poke Ranch, Marlon Brando and Marlon Brando, Jr." In light of this resolution, appellants urge that Judge Delehant erred in not requiring that Brando pay debtor for Penny Poke cattle, both weaned and grown, at the rate of $4 per head per month from April 15, 1952, until September 15, 1955.

The evidence shows that Brando credited the debtor corporation for grazing fees for Penny Poke cattle at the rate of $3 per head per month. In their objections to Brando's claims, appellants alleged that the setoffs were due at the rate of $4 per head per month as "the fair market value of the care and feed furnished by the debtor corporation". The corporate resolution, now so strenu-

[8] Apparently appellants have selected April, 1952, as the beginning date for grazing and feed charges (in the first seven claimed offsets) because Marlon Brando became manager of Black Ranches at that time.

ously urged upon us, was not relied upon as a basis for the offset, and Judge Delehant apparently viewed appellants' offset as based on a quantum meruit, rather than an express contract, theory. Having relied upon quantum meruit, appellants cannot now switch their primary reliance to the corporate resolution and, thereby, to an express contract theory. "It is elementary that on appeal the appellant must adhere to the theory on which the case was tried in the lower court". *Kirk* v. *St. Joseph Stock Yard Co.*, 206 F.2d 283, 287, and cases cited (8 Cir. 1953). Judge Delehant found in regard to this offset: "The contention appears to be that such payments were not made, either at the rate of $4 per month per head (see corporate resolution, *supra*), or upon a basis resting on its regular and fair value. The court considers that position of the objectors not to have been established. If is true that something less than perfection characterizes the accounting with, and by, Black Ranches, Inc. as it is presented to the court, but that accounting fairly reflects a course of charges and credits on the score of such pasturage and care which persuades the court that Black Ranches, Inc. was not overreached in the respect asserted, and that the Brando cattle were not accorded the status of 'freeloaders'."

In summary: (a) appellants sought recovery on the basis of the reasonable pasturage rental value, rather than on an express contract theory; (b) there was ample evidence that $3 per head per month was credited debtor for feed for the Penny Poke cattle; (c) and $3 per head per month was a reasonable credit reflecting the fair and reasonable value of the grazing privileges. Judge Delehant correctly denied this offset.

For the claimed offsets (3) and (4), *supra*, appellants rely upon the asserted fact that "Judge Delehant correctly

held that Marlon Brando, Jr. owned 500 cattle which were grazed on Debtor's land". Appellants contend that Brando, *as owner*, is responsible for, and should bear the costs of, the feeding of the cattle. It is undisputed that the Brandos did not credit debtor for feed provided the 500 cattle and their weaned calves.

Judge Delehant never explicity found that Marlon Brando, Jr. *owned* the 500 cattle. He merely found that "although the cattle were to be purchased for and in behalf of Marlon Brando, Jr." the "weight of the evidence is to the effect that in the interval of acquisition and transportation, the 'interim financing' was to be done by and in the name of Roe R. Black". Judge Delehant further found that Black mortgaged the cattle to Denver Bank, not only to secure their purchase price (as had been agreed upon between Brando and Black in their original contract discussed, *supra*), but also to secure and consolidate the indebtedness of the debtor corporation.

Beyond dispute, the parties to the July 26, 1950, contract, the subject of Brando, Jr.'s claim No. 19, *infra*, contemplated that: (1) Black would purchase 500 cattle for Brando, Jr.; (2) the purchase price would be paid by borrowed funds secured by a mortgage; (3) the cattle would become the property of Brando, Jr.; (4) Black would be obligated to defray all necessary expenses of caring for the cattle until October 31, 1952, (not April, 1952). It is just as certain that the parties did not contemplate that Black would convey the cattle by chattel mortgage to Denver Bank, in part to secure his and Black Ranches' primary indebtedness, which was consolidated on October 19, 1951, into one note amounting to $192,222.68. (See discussion, supra, re claim No. 21). Even if we accept appellants' theory that title had passed to Brando, Jr., mortgaging

the cattle to secure his and Black Ranches' indebtedness amounted to nothing less than a conversion of the animals. From that point on, only Denver Bank, and, through it, the debtor, derived any benefits from these particular cattle, the proceeds of whose sales were all applied to discharge the indebtedness of Black and Black Ranches, Inc. Under the circumstances, it would be inequitable to require Brando, Jr. to pay the reasonable value of grazing cattle from which he derived nothing. We, therefore, concur in Judge Delehant's rejection of offsets (3) and (4), supra.

Appellants next contend that they are entitled to offset the costs of winter feed for weaned and grown Penny Poke and "Brando 500" cattle (offsets (5) and (6), supra). While there was conflicting evidence as to the amounts which should have been properly credited against debtor's total indebtedness to Brando, there is no cogent evidence in the record which conclusively established that the credit allowed debtor for winter feed expenses for the Penny Poke cattle was inadequate. Appellants have not discharged their burden of proof. With regard to the so-called "Brando 500 cattle", the same reasoning which defeated grazing offsets, supra, invalidates these asserted offsets.

In the court below, and on appeal here, appellants assert that they are entitled to a setoff for profits made by the Brandos while in possession of debtor's land from April, 1952, to September, 1955. Judge Delehant's denial of this setoff was manifestly correct.

Appellants' contention that "the trial court erred in failing to allow debtor setoff and counterclaim for a part of the $62,500 purchase price of Brando's 500 cattle which debtor borrowed and later repaid Denver National Bank

under debtor's $192,222.68 chattel mortgage note", is utterly lacking in merit. Contrary to appellants' assumption, Brando did not have the "primary obligation" to Denver Bank for the $62,500, nor did Judge Delehant so find. The lower court held that the obligation was primarily that of the debtor corporation, and that view is in conformity with the evidence. The offset was properly denied.

Judge Delehant did not allow any setoff for any portion of the $7,488.90, asserted by Denver Bank (in claim No. 32) to be due and owing from debtor. Appellants insist that the setoff should be allowed "upon the ground that debtor is the third party beneficiary under the so-called 'extension agreement and guaranty' of May 27, 1952". This agreement and its import have been fully discussed, supra, in connection with claim No. 21. We agree with Judge Delehant that debtor is not entitled to the setoff.

APPEAL NO. 17,993

This appeal by Marlon Brando, Jr. is from:

(1) an order denying claim No. 22 secured status;

(2) an order denying allowance of appellants' claim No. 19, in the sum of $50,000;

(3) an order denying allowance of appellants' claim No. 20, in the amount of $17,500;

(4) an order allowing claim No. 12, as a general and unsecured claim, in favor of Roe R. Black, for one-half of $78,641.75;

(5) an order allowing claim No. 13, as a general and unsecured claim, in favor of Thomas Hart Fisher, for one-half of $78,641.75.

We have already disposed of (1) (claim No. 22), and, therefore, pass to consideration of claim No. 19.

CLAIM NO. 19

Here, Brando, Jr. seeks reversal of the order rejecting his claim of $50,000, the amount paid by him to Roe R. Black, in pursuance of a written contract, executed on July 26, 1950. The contracting parties were Marlon Brando, Jr. and Roe R. Black. There is no reference in the contract to Black Ranches, Inc. In essence, Black agreed to purchase, during the summer and fall of 1950 and prior to October 31, 1950, in the State of Texas, on behalf of appellant, 500 "Hereford heifer calves and bulls"; to finance acquisition costs; to ship them to Nebraska about May 1, 1951, and to furnish care in accordance with sound ranching practice. Black was to be paid $100 per head (a total of $50,000) for the services which he was obligated to furnish. Brando agreed to pay the $50,000 by depositing specified amounts on designated dates with National Bank of Commerce of San Antonio, Texas, escrowee. The escrowee was authorized to pay the amounts deposited to Black. The $50,000 was intended to fully compensate Black for his services in acquiring the livestock, arranging for financing, caring for them and providing feed, etc., until October 31, 1952, the termination date of the contract.

Although, as noted, Black Ranches was not a party to the contract, Brando, Jr. sought allowance of the claim against it on the pleaded theory that the contract was entered into by Black "on behalf of himself and debtor corporation, Black Ranches, Inc." Allegedly, Black "fraudulently failed to acquire the kind and quantity of cattle as and at the time required by said contract, and

fraudulently failed and refused to furnish the care and feed for said cattle as required by said contract." The claim also averred that Black Ranches, through Black, on October 19, 1951, mortgaged all cattle purchased pursuant to the contract, to Denver Bank to secure its note for $192,222.68 (this transaction has been discussed, supra, in our disposition of claim No. 21); that the amount of the indebtedness and lien to Denver Bank far exceeded the authorized acquisition costs; that all cattle purchased under the contract were sold and the proceeds therefrom applied to indebtedness of Black Ranches to Denver Bank; that Brando, Jr. received no consideration for or benefit from the $50,000 paid by him. The evidence showed, and the court found, that Brando, Jr. had fully performed his contractual obligations.

Judge Delehant predicated denial of the claim upon his finding:

> "that, to the execution of the agreement of July 26, 1950, only Marlon Brando, Jr. and Roe R. Black were parties; that the claimant's allegation that 'as deponent believes,' Roe R. Black executed that agreement in behalf of Black Ranches, Inc. is completely unsupported by the evidence. The language of the agreement itself is primary evidence upon the point. And, though with some dispute, there is evidence, which the court believes, that in approaching the execution of the contract, Marlon Brando signified his resolution to contract with Roe R. Black personally, rather than with Black Ranches, Inc. And that, as the court is persuaded, is the manner in which he actually—as well as apparently—did contract.
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> * * * * * * * * *
>
> "It is now simply found and concluded that no situation even remotely suggesting the fastening upon Black Ranches, Inc. of liability for any default by

> Roe R. Black under his contract of July 26, 1950 has been proved in this litigation. Black Ranches, Inc. was organized and still exists as a *bona fide* corporation. Its corporate existence has not been utilized or resorted to for the acquisition by Roe R. Black, or any one else, in relation to the transaction involved in Claim No. 19, of any advantage, unfair or otherwise, over Marlon Brando, Jr.
>
> "The court, therefore, refuses to erect between Black Ranches, Inc. and Marlon Brando, Jr. a contract which Roe R. Black and Marlon Brando, Jr. deliberately and understandingly refrained from making, and, having so erected it, to enforce it."[9]

Appellant invokes the principle that, where the corporation is mere instrumentality of its owner, the corporation will be bound for its owner's acts and vice versa. Anderson, Limitation to Corporate Entity, §247, p. 252; 1 Fletcher Cyclopedia, Corporations, §42, p. 199; 18 Am. Jur. 2d §§14, et seq.; *Erickson-Hellekson-Vye Co.* v. *A. Wells Co.*, 15 N.W.2d 162, 173 (Minn. 1944). Compare, *Metropolitan Holding Co.* v. *Snyder*, 79 F.2d 263 (8 Cir. 1935). In an effort to bring this case within the foregoing rule, appellant argues that the evidence shows that Roe R. Black's method of operation, involving the corporation's real estate and other assets, and his complicated manipulations, in connection with his far-flung cattle operations, "amounted to a scheme devised to defraud his cattle customers and others of vast sums of money, and that these facts bring him and his corporation, which he controlled at all times, within the rule that his debts and

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[9] The court did not express an opinion on the question of whether the contract was breached by Black.

obligations are the debts and obligations of the corporation * * *." We have carefully weighed every facet of appellant's argument and being mindful that the legal principle which appellant invokes is to be applied with caution, and not precipitately, 18 Am.Jur. 2d §14, p. 560, we are not persuaded to hold that the evidence *compelled* the finding for which appellant contends. Judge Delehant, after a thorough analysis of the operative facts and the applicable law, reached a conclusion which we refuse to disturb. We, therefore, affirm the order disallowing claim No. 19.

CLAIM NO. 20

Brando, Jr. predicates this claim upon an alleged indebtedness of $17,500. The historical facts are similar to those found in claim No. 19, supra, in that the claim has its inception in a written contract of August 8, 1951, between Brando, Jr. and Roe R. Black, to which Black Ranches is not a party and in which it is not mentioned. Black agreed to purchase 175 Hereford calves, arrange for financing, and furnish all feed and care for them, and for their progeny, until November 15, 1953. For faithful discharge of his obligations, Black was to, and did, receive the sum of $17,500 from Brando, Jr. The claim is premised on the alleged failure of Black to discharge his contractual obligations. As in claim No. 19, Brando, Jr. seeks to impose liability on debtor on the theory that the contract was entered into on the debtor's behalf and for its benefit. Judge Delehant disagreed and held that Black Ranches was neither directly nor beneficially a party to the contract. He disallowed the claim. For the reasons

stated in our disposition of claim No. 19, we affirm the order of disallowance of claim No. 20.[10]

CLAIMS NOS. 12 AND 13

Roe R. Black's original claim No. 12 alleged that Black Ranches was indebted to him in the sum of $50,502.89. Black's amended claim, filed pursuant to leave of court, increased the amount of the claim to $81,512.53. The alleged consideration for the amended claim was ranching equipment purchased by Black Ranches, Inc. from Roe R. Black, $7,750.00; monies advanced to or for Black Ranches, Inc., $73,762.53, total $81,512.53. Black further alleged that on February 7, 1956, he had assigned to Thomas Hart Fisher an undivided one-half interest "in and to said debt against Black Ranches". The claim was allowed in the amount of $78,641.75.

Fisher's claim No. 13 constitutes a claim of ownership, through the assignment from Black, of the undivided one-half of the amount alleged to be due in claim No. 12.

Objections were filed to both claims by Marlon Brando and Marlon Brando, Jr. With regard to claim No. 12, the objectors not only denied Black Ranches was indebted to Black but asserted that the converse was true; i.e., that Black was indebted to debtor. Objectors opposed Fisher's claim on the same grounds and also questioned the va-

[10] As noted by Judge Delehant there are similarities in the structure of the pleadings in claims Nos. 19 and 20, but post-contract evidence relating to claim No. 20 differed. Thus, cattle that were purchased under the August 8, 1951, contract were not involved in the Denver Bank financing. Furthermore, it does not appear that these cattle ever occupied Black Ranches. Judge Delehant did not reach the question whether Black defaulted in his engagements under the contract.

lidity of the assignment, asserting, in this regard, that the assignment was not made in good faith "but is an attempt by * * * Thomas Hart Fisher to avoid and circumvent a former order by this Court refusing permission to said Thomas Hart Fisher to appear as an attorney for * * * Roe R. Black or any of the other parties in this proceeding * * *", and asserting further that the "purported purchase or assignment * * * is champertous".[11]

Appellant does not, in this appeal, renew these separate objections to Thomas Hart Fisher's claim. Rather, it is asserted that the Fisher claim, being merely an assigned portion of the Black claim, is subject to the same alleged infirmities which are here asserted against the Black claim.

Appellant's position here is couched in this language:

> "Whether or not Roe Black actually expended the money he claims to have spent, is not the real issue here. * * * The real basis of appellant's objections to the allowance * * * of these claims are, first, that as the 'alter ego' of the corporation, he cannot owe himself money; second, that in his management of the

[11] From the printed record and the original files, we are advised that, on February 2, 1955, Judge Delehant, in open court, denied an oral motion for the admission of Thomas Hart Fisher to practice "in this court for the purpose of this case only". On February 10, 1956, the court filed its written order, denying a "further and formal" motion for admission, in which the court found "that said motion [for admission] in the light of the attempted participation heretofore in this proceeding by the said Thomas Hart Fisher and of the professional history and record in his own state of the said Thomas Hart Fisher, is not well taken and should be denied". In a 60-page typewritten opinion filed on October 10, 1958, directed to a motion filed by Fisher to disqualify Judge Delehant, on account of alleged bias and prejudice, the court elaborated upon Mr. Fisher's professional history in the State of Illinois.

> affairs of the corporation * * * Black used the assets for his own personal benefit and profit, and collected huge sums of money for the use of the corporate assets for which he has completely failed to account in this proceeding, with the result that he cannot in equity appear * * * claiming a right to share in the corporate assets along with all other general creditors."

After astutely analyzing the evidence bearing upon the claim and objections thereto, and in particular, the ability of Black to have made the asserted advances, a defense apparently stressed in the trial court, Judge Delehant stated:

> "On balance, the court considers that the evidence * * * supports the factual view that Roe R. Black, in the period under scrutiny, did have access to funds from which he could, and might, have made such advances. Undoubtedly much, almost certainly most, of them were gotten from borrowing * * *. But his making of the advances to which he testified, although perhaps indiscreet, is not, by the court, regarded as impossible or incredibly improbable".

The difficulty with appellant's position is that he failed to offer any evidence to refute Black's testimony in support of the claim. True, the overall picture lends support to appellant's hypothesis, but Judge Delehant was not sufficiently persuaded by such generalization to reject the claim. In the absence of any counter evidence, and inasmuch as the court chose to credit Black's testimony, we should not interfere, particularly since we are not left with a firm feeling that a mistake has been made.

As we have seen, appellant now tacitly concedes the validity of Fisher's assignment. This concession obviates the necessity for consideration of this phase of claim

No. 13. Since it rests on Black's claim, the allowance of which we affirm, we likewise affirm the court's order allowing claim No. 13.

Finally, there remains the question whether the district court erred in failing to subordinate the claims of Black, and his assignee, Fisher, to any and all claims against the debtor corporation, a contention which appellant vigorously urges upon us.

The premise for appellant's position is that the claim "does not represent legitimate corporate debt; it was, if anything, equity capital advance by the sole stockholder, who completely controlled the corporation, at a time when no other form of financing could have been obtained".

The district court, mindful of the applicable law, appraised "the plight of the claim which is before it", and found "[i]n respect of the claim, Roe R. Black is completely guiltless of fraud or over-reaching as against the corporation, or as against its other creditors, or any of them. The reality of his rather far flung claim is convincingly established, despite some rather probable difficulty in the collection of the evidence in support of it. His advancements were made almost entirely for the operative needs of the corporation". Judge Delehant also was convinced that the evidence failed to establish appellant's contention that the advancements made by Black constituted capital contributions. In this regard, the court found that:

> "In its inception, Roe R. Black's venture into the acquisition of the owned ranch land—and, as an ensuing consequence, the capital structure of Black Ranches, Inc.—were certainly not liberally financed. Yes, as the enterprise was first envisioned, its financial position was not too straitened. Actual operating results eventually made its day by day cash position uncomfortably narrow. But that situation ma-

> tured, and was recognized as an urgent problem during the spring of 1952, therefore, at the close of the period of many months, within which the items of Claim No. 12 were accumulating."

Having so found, the court concluded that claims Nos. 12 and 13 should be accorded a like position with the other general and unsecured claims, and entered an order accordingly.

The question whether an allowed claim should be subordinated to payment of other general creditors is, by its very nature, one that must be determined on an ad hoc basis. It is a question addressed to the conscience of the Judge sitting as a court of equity. *Pepper* v. *Litton*, supra, 308 U.S. 295 (1939).

Concededly, Black and his wife were the owners of all of the stock of debtor corporation and he was a director, president and manager thereof during the time the advances were made to the corporation. But a major stockholder, director and managing officer is not, by virtue of that relationship, forbidden to contract with the corporation or to lend money to it. In the early case of *Wyman* v. *Bowman*, 127 F. 257, 273 (8 Cir. 1904), Judge Walter Sanborn laid down the rule in this language:

> "Contracts and transactions between individuals and corporations of which they are directors or officers, which are fair, which are made in good faith, which do not secure to the individuals any undue or unjust benefit or advantage, and in which the interest of the individuals and the duty of the officials work in unison for the welfare of the corporation, are valid and enforceable both at law and in equity." (Citing cases).

The rule was recognized in *Stuart* v. *Larson*, 298 F. 223, 225-226 (8 Cir. 1924); in *Goldstein* v. *Wolfson*, 132 F.2d 624 (2 Cir. 1943), where the Second Circuit affirmed the

district court which had rejected the contention that the advances by claimants were properly to be considered as capital contributions. See also, *In re Madelaine, Inc.*, 164 F.2d 419 (2 Cir. 1947).

Although appellant apparently recognizes the principle enunciated in the above authorities, his position obviously is that it has no application here. He rests his contention upon *Boyum* v. *Johnson*, 127 F.2d 491 (8 Cir. 1942); Oleck, Modern Corporation Law, §194, p. 486, §195, pp. 486-488; *Taylor* v. *Standard Gas & Elec. Co.*, 306 U.S. 307 (1939); *Gannett Co.* v. *Larry*, 221 F.2d 269 (2 Cir. 1955). The ultimate decisions in the cases cited by appellant are favorable to him, but the cases are not controlling because of distinguishing factual differences. In *Boyum* v. *Johnson*, supra, said to be "exactly in point", Judge Johnsen pointed out that Boyum's "general dealings with the corporation were not on the arm's length plane of the other creditors." Ibid. 494.

Our view of the evidence on the subordination issue, in light of the entire factual picture, satisfies us that Judge Delehant properly accorded Black's claim a like position with the other general and unsecured claims. In the final analysis, we perceive of no vital difference between the position occupied by Black, when his advancements were being made, and the status of Brando, Jr. during the period of time the debtor corporation borrowed funds, through Brando, from Brando, Jr. Thus, the argument appellant makes could, with equal force, be made in regard to the claims allowed in his favor.

In conclusion, the various orders and rulings appealed from are in all respects affirmed.

A true copy.

Attest.

Clerk, U.S. Court of Appeals, Eighth Circuit.

PETITION FOR A WRIT OF CERTIORARI

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No. 545

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

IN THE MATTER OF BLACK RANCHES, INC., A Nebraska Corporation, Debtor, in Corporate Reorganization Proceedings under Chapter X of the Federal Bankruptcy Act.

ROE R. BLACK, AVIS C. BLACK, ROE C. BLACK, BLACK RANCHES, INC., a corporation, Debtor, and THOMAS HART FISHER,

Petitioners,

VS.

DENVER UNITED STATES NATIONAL BANK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

LESLIE R. BISHOP
38 South Dearborn Street
Chicago, Illinois 60603
Attorney for Petitioners

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vs.

DENVER UNITED STATES NATIONAL BANK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioners, Roe R. Black, Avis C. Black, Roe C. Black, Black Ranches, Inc., a corporation, Debtor, and Thomas Hart Fisher, respectfully pray this Court's writ of certiorari to review and reverse the decision of the United

States Court of Appeals for the Eighth Circuit in this case, and to remand the case to the District Court of the United States for the District of Nebraska for further proceedings in that court.

CITATION TO OPINIONS BELOW.

The opinion and decision of the District Court of the United States for the District of Nebraska, insofar as Petitioners are informed, has never been officially reported.

The opinion and decision of the United States Court of Appeals for the Eighth Circuit in this case is reported in 362 Fed. (2d) 38, and is reprinted in full as Appendix I to this petition.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The opinion of the Court of Appeals was filed and its judgment rendered on May 12, 1966. Petitioners' petition for rehearing (with motions (1) that the language of the Court of Appeals' opinion be amended, and (2) that the Court of Appeals hear such petition and motion with such other judge or judges of some other United States Court of Appeals as might be designated by the United States Supreme Court) was denied without a supplemental opinion on June 21, 1966. This petition is filed within 90 days thereafter, in this Court.

This Court's jurisdiction is invoked under Section 1254(1) of the United States Judicial Code (U.S.C.A., Tit. 28, Sec. 1254(1)) which confers upon this Court jurisdiction to review decisions of the United States Courts of Appeals.

The United States District Court's jurisdiction was based upon the provisions of the Federal Bankruptcy Act (U.S.C.A., Title 11, Chap. 2, Section 2).

THE QUESTION PRESENTED FOR REVIEW.

The question for review is: Were Petitioners deprived of their rights under the Federal Bankruptcy Act and the Federal Rules of Civil Procedure, because the Court of Appeals held that a judgment allowing Respondent's Claim No. 32 in the amount of $7,488.90 based upon Debtor's note held by Respondent was not "clearly erroneous" under the evidence, despite the fact that the record showed, and the Court of Appeals held, that a "SETTLEMENT IN FULL" had been made of Debtor's entire note liability to Respondent, without any evidence whatever in the record to indicate that said "SETTLEMENT IN FULL" was not a "full accord and satisfaction" which was binding and effective upon Respondent, as the note holder.

Ignoring the "SETTLEMENT IN FULL," the trial court held (R. 172) that a stamp bearing the word "DISCOUNT," which Respondent had placed on Debtor's note when Respondent entered into the "SETTLEMENT IN FULL" of Debtor's liability thereon, did not mean what "discounting" an obligation has been invariably held to mean by the courts, but was meant merely to identify the Discount Department of the Respondent, even though there was no evidence in the record whatsoever connecting the Discount Department with the "discount" stamp placed on Debtor's note at the time Respondent accepted the "SETTLEMENT IN FULL" of Debtor's note obligation. Thus the question here raised is whether the "clearly erroneous" rule can properly be applied in the Court of Appeals to support a bankruptcy claim allowed in the trial court, *when there is a total absence of any*

evidence in the record to support the only ground for allowing the claim relied upon in the trial court and in the Court of Appeals, and when the Court of Appeals has made a finding (Appendix I, p. 4) which in and of itself makes the trial court's judgment erroneous.

In other words, the question this Court is asked to decide is whether the Court of Appeals can ignore all of the other decisions in this Honorable Court and other Courts of Appeal, by using the "clearly erroneous" rule to affirm a judgment allowing a substantial bankruptcy claim which is plainly erroneous on the uncontested record and contrary to the findings of both the Bankruptcy Court and the Court of Appeals.

STATEMENT OF THE CASE.

This is a bankruptcy case which was instituted by five creditors against Black Ranches, Inc., a Nebraska corporation, under the corporate reorganization provisions of Chapter X of the Federal Bankruptcy Act, in the District Court of the United States for the District of Nebraska nearly twelve years ago on October 22, 1954. More than ten years later on December 4, 1964, the District Judge entered a judgment allowing Claim No. 32 of Respondent against the Debtor as a general unsecured claim in the amount of $7,488.90.

The primary question raised by Respondent's Claim No. 32 was whether there was any evidence whatsoever in the trial court to controvert Respondent's notation which it placed upon its own bank records to the effect that it had made a "SETTLEMENT IN FULL" resulting in a "total liability" of ZERO [".00"] (with a third party, known as the Brando group), the effect of which "SETTLEMENT IN FULL" was to extinguish all of Respondent's claims against the Debtor on Debtor's note held by Respondent, under the principle of a "full accord and satisfaction."

The crucial bank entry in question which Respondent placed upon its own bank records in and of itself left no doubt whatsoever that Respondent's entire Claim No. 32 against Debtor upon its note had been nullified by the "SETTIEMENT IN FULL." Here it is (R. 441-2):

"CREDITS

	Date	Amount	Number	Interest	Total Liability
	Mar. 1, '56	$7,391.29	[78.042]		$1,162.10
Settlement In Full	May 3, '56	1,162.10	[78.042]	$6,134.79	.00"

It is obvious that the foregoing written entry on Denver's own bank records of the settlement transaction involving the Debtor corporation's debt to the Denver Bank shows on its face that Debtor's "total liability" was reduced by the "SETTLEMENT IN FULL" to ZERO ["**.00**"], *thereby nullifying the Denver Bank Claim No.* 32 *against the Debtor corporation.*

Here is the Court of Appeals' finding which confirms the "SETTLEMENT IN FULL" by Respondent of its Claim No. 32 (Appendix I, p. 2):

> "The circumstances attending the payment to Denver Bank of the Brando note are important. The face amount of $14,372.58 and accrued interest of $315.60 (total, $14,688.18) was paid in two installments: on March 1, 1956, in the amount of $7,391.29, and on May 3, 1956, in the amount of $7,296.89. Denver Bank's ledger sheet for "Borrower Black Ranches, Inc." shows that the first installment was applied toward payment of the unpaid principal on the Black note and that, after such payment, there remained a balance due on the principal of $1,162.10. The second installment was applied toward payment of the balance of the principal of the Black note ($1,162.10) and $6,134.71 of the interest due thereon. *There appears upon the* [*Respondent's*] *ledger sheet, on the same line of the entry showing the last payment, the words 'Settlement in full'. The words 'Total Liability' appear in the last column of the printed form of the ledger sheet. Under these words and on the line reflecting the entry of the last payment, there appears '.00.'.*" (Emphasis added.)

The trial judge totally ignored in his opinion the "SETTLEMENT IN FULL" which proved beyond all doubt that there had been a full accord and satisfaction of Debtor's obligation to Respondent. Instead, the trial judge found as a fact (R. 172) that Respondent's stamp on Debtor's note of the words

"MAY 3, 1965
D N B
DISCOUNT"

made use of the word "Discount" as a mere "device to identify the department of the bank through which that transaction was cleared" and that therefore the word "discount" had "no connotation of forgiveness." In other words, the effect of the trial court's decision was that the "SETTLEMENT IN FULL" was not a "full accord and satisfaction" of Debtor's note held by Respondent and did not extinguish Debtor's note obligation, because the word "Discount" stamped on Debtor's note at the time of the "SETTLEMENT IN FULL" did not imply a settlement in full, since the word "Discount" was a mere "device to identify the department of the bank through which that transaction was cleared." The following finding of fact by the trial judge in his opinion (R. 172) was ~~later~~ quoted *verbatim* by the Court of Appeals in its opinion and decision affirming the trial judge, as follows (Appendix I, p. 4):

> "The payment and satisfaction in full of the obligation asserted in Proof of Claim No. 32. (In this connection, the court has had constantly in view a position of the objectors, not strictly pleaded, but advanced in their briefs, that the stamped impression of the word, DISCOUNT, *supra,* upon the note on the payment of the balance of its principal sum, is to be interpreted in such wise as to amount to a release or abandonment of any actual deficiency in the payment of interest. *That position is incorrect, honestly enough, perhaps, but incorrect, nevertheless. The use of the word DISCOUNT was and is a device to identify the department of the bank through which that transaction was cleared.* It had and has no connotation of forgiveness. The *evidence* conclusively so shows, even

without resort to the judicial awareness that such indulgence is not a common practice in the banking fraternity.)" (Emphasis aded.)

Expressed in other words, both the trial court and the Court of Appeals held that the word "discount" stamped on Debtor's note at the time that the settlement was made as *a full accord and satisfaction* did not mean that Debtor's note was "discounted" for less than the face amount due on the note, under the well-established principle laid down by such cases as the following:

National Bank v. *Johnson,* 104 U.S. 271;
Danforth v. *National State Bank,* 48 Fed. 271 (3rd CCA);
Alworth-Washburn Co. v. *Helvering,* 67 Fed. (2d) 694;
Salmon Falls Bank v. *Leyser,* 22 S.W. 504, 509;
First National Bank v. *Sherburne,* 14 Ill. App. 566, 570;
Carroll v. *Drury,* 170 Ill. 571.

There was no evidence whatsoever in the record to prove as a fact that the word "discount", which was placed by Respondent on Debtor's note at the time the "SETTLEMENT IN FULL" was made by Respondent for less than the face amount due on the note, was a mere identifying "device" to indicate Respondent's "Discount Department." Therefore, in applying the "clearly erroneous" rule, the Court of Appeal's affirmance of the trial court's judgment was based upon NO EVIDENCE AT ALL to support the trial judge's only finding of fact upon which its decision was made to turn. In the landmark case of *U.S.* v. *U.S. Gypsum Co.,* 333 U.S. 364, at 394-5, this Court rejected (p. 395) the findings of fact of the trial court under the "clearly erroneous" rule when, although there may be evidence to support the findings of fact, "the re-

viewing court on the entire evidence is left with the definite and firm conviction that a mistake had been committed." Under the rule of this Court in the *U. S. Gypsum* case, therefore, a finding of fact is *a fortiori* "clearly erroneous" whenever, as in the case at bar, *there is no evidence at all to support it.*

In applying the "clearly erroneous" rule as laid down by this Court in the *U.S. Gypsum* case, the various United States Courts of Appeals for all of the Circuits, including the Eighth Circuit itself, have consistently held that the Courts of Appeals must set aside all findings of fact by the trial court for which there is *no reasonable basis in the evidence,* for this obviously makes them "clearly erroneous."

Minneapolis, St. Paul, etc. R. Co. v. *Metal-Maltic, Inc.,* 323 Fed. (2d) 903 (8 CCA);
U.S. v. *Yellow Cab Co.,* 338 U.S. 338, 342;
U.S. v. *U.S. Gypsum Co.,* 333 U.S. 364, 395;
Commissioner of Internal Revenue v. *Welch,* 345 Fed. (2d) 939 (5 CCA);
J. Strickland & Co. v. *U.S.,* 352 Fed. (2d) 1016, 1019 (6 CCA);
Romero v. *Garcia & Diaz, Inc.,* 286 Fed. (2d) 347 (2 CCA).

To sum up, therefore, in the case at bar, not only was there no consideration given by the trial judge to the "SETTLEMENT IN FULL," which in itself was sufficient to prevent the allowance of Claim No. 32 which had been "fully settled," but the only ground found by the trial judge for his allowance of Respondent's Claim No. 32 against Debtor and the only ground found by the Court of Appeals for affirming the trial court's judgment were both

"clearly erroneous," because there was *no evidence whatsoever in the record* to sustain the trial court's finding of fact that the word "discount," as used in Respondent's stamp on Debtor's note, did not mean that Respondent had "discounted" the note for less than the face amount due on it, but merely identified Respondent's Discount Department.

The first opportunity which Petitioners have ever had to challenge the failure of the trial judge to hold that the "SETTLEMENT IN FULL" had accomplished a "full accord and satisfaction" of Debtor's note obligation to Respondent, and also to challenge the trial judge's finding of fact that the word "Discount" stamped on the face of the note was a mere "device" to "identify" Respondent's Discount Department, arose in the Court of Appeals, where these questions were fully briefed and argued by Petitioners in their original and reply briefs prior to the Appellate Court's opinion and decision in this case. The same questions were also fully briefed in Petitioner's Petition for Rehearing (and other relief) which they timely filed in the Court of Appeals after the decision and opinion had been rendered in that court affirming the trial court's allowance of Respondent's Claim No. 32 in said amount of $7,488.90.

Petitioners have filed in this Court as No. 1825 Miscellaneous their "Motion for Leave to File Petition for Designation of at Least One Circuit Judge Now Sitting on One of the United States Court of Appeals for some Circuit Other Than the Eighth Circuit to Act Jointly with the Judges of the United States Court of Appeals for the

Eighth Circuit in Passing Upon and Deciding the Petitions for Rehearing to be Filed by Petitioners as Appellants in Appeals Nos. 17990-1-2 in said Eighth Circuit Court."

Although said petition filed as No. 1825 Miscellaneous has not yet been ruled upon by this Court, Petitioners nevertheless desire to draw this Court's attention to such petition at this time, and to incorporate the same by reference thereto, since it is relevant to the issues raised by this Petition for Writ of Certiorari.

REASONS RELIED UPON FOR THE GRANTING OF THE WRIT.

The fundamental and well recognized principle of the "clearly erroneous" rule is that no judgment of the trial court should be allowed to stand affirmed in the Court of Appeals whenever the trial court's judgment is "clearly erroneous" (a) because the trial judge has ignored a crucial fact shown by the record which makes it erroneous (in this case a "SETTLEMENT IN FULL" constituting a full "accord and satisfaction" of Debtor's note liability to Respondent), or (b) because there is *no evidence at all* to support the judgment entered by the trial court.

The abuse of the "clearly erroneous" rule by the Courts of Appeals has now reached the point where this Honorable Court cannot fail to recognize that such abuse constitutes a grave threat to the administration of justice in the Federal courts.

In the case at bar, the Court of Appeals misapplied the "clearly erroneous" rule despite the fact that there was *conclusive evidence* that Debtor's note liability to Respondent had been the subject of a "SETTLEMENT IN FULL" which constituted a "full accord and satisfaction" of such note liability; and instead of reversing the judgment allowing Claim No. 32 on this ground alone, the Court of Appeals affirmed the allowance of Claim No. 32 in this bankruptcy case upon the basis of a finding of supposed "fact," to-wit, that the word "Discount" in the stamp applied to Debtor's note at the time of the "full accord and satisfaction", was a mere "device" to identify Respondent's Discount Department, *when in fact there is not a scintilla of evidence in this record to support such finding.*

Surely the time has come for this Court to grant certiorari to prevent the gross injustices which are now being perpetrated by the Courts of Appeals by their flagrant misapplication of the "clearly erroneous" rule to such situations as in the case at bar.

CONCLUSION

Petitioners recognize that the granting of this Petition for Certiorari, as well as this Court's granting of the Petition in 1825 Miscellaneous, is discretionary with the Court and will not ordinarily result from mere error by either the trial court or the Court of Appeals, *unless such error controverts fundamental Federal law.*

However, in the case at bar both the trial court and the Court of Appeals have rendered judicial decisions which violate the basic principle of Federal law incorporated in the "clearly erroneous" rule, by ignoring the "SETTLEMENT IN FULL" which extinguished Respondent's Claim No. 32 against Debtor corporation, and also by ignoring the true legal and factual meaning of the word "Discount" which was stamped on the face of the Debtor's note at the time the "SETTLEMENT IN FULL" was consummated for a lesser amount than the face amount then due on Debtor's note, thereby violating both Federal bankruptcy law and the Federal Rules of Civil Procedure and all applicable decisions not only of this Honorable Court but of the Circuit Courts of Appeal, including the Eighth Circuit, as well.

This violation of Federal law is therefore so plain and so undeniable in this case that Petitioners respectfully submit that this case calls for an exercise of this Court's power of supervision, and it is therefore respectfully prayed that the Court should grant the prayer of the present petition accordingly.

PRAYER FOR PETITION FOR WRIT OF CERTIORARI.

Wherefore, Petitioners pray for the issuance of this Court's Writ of Certiorari to review and reverse the judgment of the United States Court of Appeals for the Eighth Circuit in the case of "*In the Matter of Black Ranches, Inc., a Nebraska corporation, Debtor; Roe R. Black, et al., Appellants.* v. *Denver United States National Bank,* No. 17992 reported in 362 Fed. (2d) 38, and to remand this case to the District Court of Nebraska for further proceedings in that Court, to the end that Petitioners' Federal rights herein claimed may be effectuated.

Respectfully submitted,

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APPENDIX I

No. 17,992

In Bankruptcy

Roe R. Black, Avis C. Black, Roe C. Black, Black Ranches, Inc., a Corporation, Debtor, and Thomas Hart Fisher,
Appellants,

v.

Denver United States National Bank,
Appellee.

Appeal from the United States District Court for the District of Nebraska.

[May 12, 1966.]

Before MATTHES and GIBSON, Circuit Judges; HUNTER, District Judge.

MATTHES, Circuit Judge.

The district court allowed claim No. 32 as a general and unsecured claim in the amount of $7,488.90, representing unpaid interest due Denver United States National Bank, successor to The Denver National Bank (hereinafter sometimes referred to as "Denver Bank"), on the note executed by Roe R. Black and Black Ranches, Inc. on October 19, 1951, in the face amount of $192,222.68.[1] It stands without

[1] Hereinafter we shall refer to Black and Black Ranches, Inc. collectively as "Black" and Black Ranches, Inc. as "Black Ranches" or "debtor corporation".

contradiction that the amount allowed has not been paid to Denver Bank. Appellants, nevertheless, contend that the payment by "Penny Poke Ranch, Inc., Marlon Brando and Marlon Brando, Jr."[2] of their note to Denver Bank was "a full accord and satisfaction of all moneys due and owing" under Black's note to Denver Bank.

Many of the operative facts have been discussed in our consideration of Marlon Brando, Jr.'s claim No. 21 in appeal No. 17,991, *Black, et al.* v. *Brando, et al.* (opinion filed contemporaneously). More particularly, we reviewed: (a) the history of the Black note to Denver Bank for $192,222.68; (b) the execution of the guaranty agreement between Denver Bank and the Brando group; (c) Denver Bank's suit on the agreement; (d) the settlement of the suit by the Brando group giving their note to Denver Bank in the principal amount of $14,372.58; (e) the liquidation of the Brando group note by payment of the full amount, including interest, due thereon.

The circumstances attending the payment to Denver Bank of the Brando note are important. The face amount of $14,372.58 and accrued interest of $315.60 (total, $14,688.18) was paid in two installments: on March 1, 1956, in the amount of $7,391.29, and on May 3, 1956 in the amount of $7,296.89. Denver Bank's ledger sheet for "Borrower Black Ranches, Inc." shows that the first installment was applied toward payment of the unpaid principal on the Black note and that, after such payment, there remained a balance due on the principal of $1,162.10. The second installment was applied toward payment of the balance of the principal of the Black note ($1,162.10) and $6,134.71 of

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[2] Hereinafter we shall sometimes refer to Penny Poke Ranch, Inc., Marlon Brando, and Marlon Brando, Jr. as the "Brando group".

the interest due thereon. There appears upon the ledger sheet, on the same line of the entry showing the last payment, the words "Settlement in full". The words "Total Liability" appear in the last column of the printed form of the ledger sheet. Under these words and on the line reflecting the entry of the last payment, there appears ".00".

The entries of September 22, 1955, on the Black Ranches ledger sheet should also be noticed. The first entry is "Charged to P and L on This Day" the amount of $8,553.39, this being the balance of the principal due at that time on the Black note. Under the "Total Liability" column appears ".00". The second September 22, 1955, entry reflects that the same amount was debited to Black Ranches' account so that after the second entry the ledger sheet reflected that there still remained a balance due on the principal of $8,553.39.

It also stands undisputed that upon payment by Brandos of the balance due on the principal of the Black note, Denver Bank placed the stamp on the face of the note:

May 3, 1956
D N B
Discount

and delivered the note to Marlon Brando. As shown in our opinion in No. 17,991, this note formed the basis of Brando, Jr.'s claim No. 21.

Appellants do not suggest the existence of any direct evidence to prove their theory. They rely, however, upon the circumstances and argue, in effect, that the only logical inference that may be drawn from the circumstantial

evidence is that the parties intended that the payment by the Brando group would constitute full satisfaction of debtor's obligation to Denver Bank.

Appellants mistakenly assert that Judge Delehant "totally ignored" the accord and satisfaction issue. The Judge came to grips with the question in his memorandum opinion (pages 171 through 173) of the printed record in this language:

> "Similarly, upon factual bases, the court has announced its finding of the want of support for the objections to the allowance, in whole or in part, of the claim".

The Judge then summarized paragraphs 1 and 2 of the objections in which it was alleged that Denver Bank knew that the Black promissory note had been executed as an accommodation for Marlon Brando, Jr. and others in connection with the financing and purchase of the cattle owned by Marlon Brando, Jr. Paragraph 3 of the objections was disposed of by Judge Delehant as follows:

> "The payment and satisfaction in full of the obligation asserted in Proof of Claim No. 32. (In this connection, the court has had constantly in view a position of the objectors, not strictly pleaded, but advanced in their briefs, that the stamped impression of the word, DISCOUNT, *supra*, upon the note on the payment of the balance of its principal sum, is to be interpreted in such wise as to amount to a release or abandonment of any actual deficiency in the payment of interest. That position is incorrect, honestly enough, perhaps, but incorrect, nevertheless. The use of the word DISCOUNT was and is a device to identify the department of the bank through which that transaction was cleared. It had and has no connotation of forgiveness. The evidence conclusively so shows, even without resort to the judicial awareness that such indulgence is not a common practice in the banking fraternity)."

The Judge noted that, in paragraph 5, the objections asserted that, upon the payment of the Brando note, the Denver Bank satisfied all obligations of Black Ranches, Inc.

In this court, appellants rely upon Restatement of Contracts, § 421, and cases which stand for the proposition that a payment by a third person can result in an accord and satisfaction.

Section 421 of Restatement provides, in pertinent part:

> "A payment or other performance by a third person, *accepted by a creditor as full or partial satisfaction of his claim,* discharges the debtor's duty in accordance with the terms on which the third person offered it." (Emphasis supplied).

Tarascio v. *Mancuso,* 3 N.W.2d 400 (Neb. 1942) and *Murphy* v. *Omaha Loan & Building Ass'n,* 3 N.W.2d 403 (Neb. 1942) cite with approval the foregoing section of Restatement. Cf. also, *Grouf* v. *State National Bank of St. Louis,* 76 F.2d 726 (8 Cir. 1935); *Moers* v. *Moers,* 229 N.Y. 294, 128 N.E. 202, 14 A.L.R. 225 (1920). The key element of accord and satisfaction is the intention of the parties, which as a rule presents a question of fact. But it becomes a question of law if the evidence directly or through reasonable inferences, creates no conflict as to intention. See, *Pitts* v. *National Ind. Fisheries Co.,* 206 P. 571 (Colo. 1922); *Pring* v. *Udall,* 31 P.2d 1113 (Colo. 1934); *Swanson* v. *United-Greenfield Corporation,* 239 F. Supp. 299, 305 (D. Ct. Conn. 1965).

We are not inclined to believe that the evidence establishes, as a matter of law, that the parties intended that the payment to Denver Bank of the Brando note was to operate as full satisfaction of the Black note. To be sure, the records of the bank and its failure to retain the Black note in its possession are circumstances which lend vitality

to appellants' position. However, there are additional facts which the trial court was entitled to, and did, consider in resolving the accord and satisfaction issue. A representative of the bank testified that the "Total Liability" column as a whole, and the figures ".00", in particular, appearing as a part of the entry on the ledger sheet of May 3, 1956, referred solely to the principal of the note and not the interest. That is, the ".00" entry meant that only the principal of the note had been fully paid. The witness also explained that "May 3 D N B DISCOUNT" appearing on the note merely identified the department of Denver Bank responsible for the mechanical handling of the transaction. This witness further testified that the entries on September 22, 1955, indicating that the balance due on the principal had been charged to profit and loss, were made as a part of normal bookkeeping procedures to reflect a decision of Denver Bank's board of directors complying with the requirement of the bank examiner that the loan be transferred to the inactive ledger. This requirement was implemented by posting the item off the ledger and then posting it back on the ledger on the same day.

Appellants forcefully argue that the delivery of the Black note to the Brando group for an amount less than the amount still due on the note "not only released Penny Poke and the Brandos from all further liability under their written guaranty of Debtor's note, but furnished still further written evidence of Denver's intentional cancellation and express renunciation of its rights as holder of Debtor's note, under Sections 119, 120 and 122 of the Negotiable Instruments Law." Certainly the delivery of the note is *evidence* of an intent to cancel, but it is not *conclusive* of that question. Judge Delehant, being aware

of this circumstance, found that "[s]uch delivery was made to enable Marlon Brando, Marlon Brando, Jr. and Penny Poke Ranch, Inc., or any of them, to make any proper use of the note in the course of their dealings with Roe R. Black and Black Ranches, Inc., or either of them".

We have examined the sections of the Uniform Negotiable Instruments Act relied upon by appellants.[3] In summary, these sections enumerate acts which will operate: (a) to discharge a negotiable instrument (§ 119); (b) to discharge a person secondarily liable (§ 120); (c) for renunciation of the holder's rights against any party to the instrument (§ 122). The applicability of the provisions of NIA must, of necessity, rest upon the controlling facts. Upon this record we find no basis for applying the cited sections of NIA.

The legal relationship of debtor corporation and the Brandos to Denver Bank at the time the Brando payment was made is an important factor. If, as appellants argue, the Brandos were primarily liable and debtor corporation was secondarily liable to the bank, a different result probably would ensue. But that issue was decided adversely to appellants in disposition of Brando, Jr.'s claim No. 21. See opinion filed contemporaneously in appeal No. 17,991, *Black, et al.* v. *Brando, et al.* The additional arguments advanced by appellants are not persuasive. We adhere to the view that Judge Delehant correctly determined that debtor corporation was the primary obligor, as maker, of the Black note to Denver Bank and the Brandos were liable only as guarantors by virtue of the guaranty agreement.

---

[3] The Uniform Negotiable Instruments Act has been adopted in Nebraska and Colorado. Neb. Rev. Stat. §§ 62-101 to 62-1,195; Colo. Rev. Stat. §§ 95-1-1 to 95-4-7. Since the sections of the Colorado and Nebraska statutes cited here are *similar* to the NIA sections, we shall cite the NIA.

Appellants also question the validity of the allowance on the assumption that Cobbey and Brando had concocted a fraudulent scheme to take over debtor's ranch property. They project this notion by asserting that Denver Bank "was a direct participant in the Brando-Cobbey fraudulent 'project' ". There is not a scintilla of direct evidence to prove that Denver Bank was guilty of any misdeeds or wrongdoing. Neither do the circumstances support an inference of that nature. This contention was not espoused below. It should not have been raised in this court.

Neither is there substance in appellants' final contention that the court erred in failing to hold that the guaranty agreement between Denver Bank and the Brando group "was a third-party contract * * * for the benefit of Debtor as the third-party beneficiary, which contract could not be terminated without Debtor's consent which was never given, and therefore such contract precludes Denver's right to assert its claim No. 32 against Debtor, and thus deprive Debtor of its benefits thereunder".

From what has been said above and in our opinion in No. 17,991, the answer is obvious. The "Guaranty Agreement" was precisely what those words connote. Ostensibly the agreement constituted a guaranty by the Brando group to pay the Black note to Denver Bank in the event Black and debtor corporation, the makers and primary holders, failed to discharge their obligation. Nothing appears to require or, for that matter, justify interpreting the document as a third-party contract. Judge Delehant ruled this contention against appellants. His holding was right and we concur therein.

In summary, we are left with the impression that appellants' basic contention and their supporting arguments are "primarily grist for the trier of fact and not for us

as a reviewing court''. A careful study of the record convincingly demonstrates that Judge Delehant's findings of fact are not clearly erroneous and were not induced by a misconception of the law. The order appealed from is affirmed.

By way of addendum, we accord recognition to Judge Delehant's untiring patience, understanding attitude and judicial fairness, demonstrated throughout this unduly protracted litigation. Judge Delehant maintained poise and restraint and exhibited commendable judicial temperament throughout the long ordeal of the numerous hearings. It is quite evident that the Judge, through a painstaking analysis and study of the evidence, was able to comprehend the entangled financial affairs of the debtor corporation. His adjudication of the rights of the creditors who are parties to the various appeals meets with our full approval.

The voluminous original files and printed record attest to the time-consuming task of considering and disposing of not only the claims, but sundry other matters. The fact remains, however, that this proceeding was instituted nearly twelve years ago. When our decisions become final, we trust that a plan or plans for reorganization will be timely filed and acted upon, or that other appropriate action will be pursued to bring this proceeding to a conclusion.

A true copy.

Attest:

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IN THE

Supreme Court of the United States

October Term, 1965

No. 544

IN THE MATTER OF BLACK RANCHES, INC., A Nebraska Corporation, Debtor, in Corporate Reorganization Proceedings under Chapter X of the Federal Bankruptcy Act.

ROE R. BLACK, AVIS C. BLACK, ROE C. BLACK, BLACK RANCHES, INC., a corporation, Debtor, and THOMAS HART FISHER,

Petitioners,

vs.

ANNA C. BRANDO, as Administratrix of the Estate of MARLON BRANDO, SR., Deceased, and MARLON BRANDO, JR.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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IN THE

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October Term, 1965

No. 544

IN THE MATTER OF BLACK RANCHES, INC., A Nebraska Corporation, Debtor, in Corporate Reorganization Proceedings under Chapter X of the Federal Bankruptcy Act.

ROE R. BLACK, AVIS C. BLACK, ROE C. BLACK, BLACK RANCHES, INC., a corporation, Debtor, and THOMAS HART FISHER,

Petitioners,

vs.

ANNA C. BRANDO, as Administratrix of the Estate of MARLON BRANDO, SR., Deceased, and MARLON BRANDO, JR.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

Respondents, Anna C. Brando, as Administratrix of the Estate of Marlon Brando, Sr., Deceased, and Marlon Brando, Jr., respectfully pray the Court's denial of petitioners'

application for this Court's writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The citation of opinions below is adequately set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Whether the trial court and the Court of Appeals, in allowing respondents' claims in the amount of $110,117.40 as unsecured claims and in denying petitioners' alleged set-offs and counterclaims in the amount of $99,108.50, prevented petitioners from relying upon an express contract theory to establish petitioners' set-offs and counterclaims and whether the trial court was clearly wrong in finding that the respondents were not guilty of fraud?

STATEMENT OF THE CASE

On October 22, 1954, in the District Court of the United States for the District of Nebraska, five creditors instituted proceedings against The Black Ranches, Inc., a Nebraska corporation, pursuant to the corporate reorganization provisions of Chapter X of the Federal Bankruptcy Act. The trial court in a meticulously detailed opinion allowed various claims of respondent against the debtor corporation as general unsecured claims in the amount of $110,117.40 and denied petitioners' set-offs and counterclaims in the amount of $99,108.50.

To support their alleged set-offs and counterclaims, peti-

tioners offered and the trial court received evidence, among which was a resolution in the corporate minutes. The court, considering the resolution, stated:

> "What exhibit 263 (the corporate minute book) reflects is that the Directors, so far as the corporate entity was concerned, had made a record of their declaration of what should be the rate. Now I take it, except for the impact of Mr. Brando's ostensible participation in that meeting, which I understand him to here deny or to question as a witness, that there is no evidence of a bilateral contract upon the subject." (Supp. R. 123)

In conclusion, the court stated and held:

> "The contention appears to be that such payments were not made, either at the rate of $4.00 per month per head (see corporate resolution, *supra*,) or upon a basis resting upon its regular and fair value. The court considers that position of the objectors not to have been established." (Petition, App. 25)

Petitioners, however, recognizing the weakness of an express contract theory, principally relied upon the quantum meruit theory as evidenced by the pleadings and proof. The Court of Appeals, commenting on this aspect, held:

> "Having relied upon quantum meruit, appellants (petitioners) cannot now switch their primary reliance to the corporate resolution and, thereby, to an express contract theory." (Petition, App. 25)

The trial court also concluded that $3.00 per head per month was reasonable and that Black Ranches, Inc., had received credit in that amount.

Concerning petitioners' defense of fraud to the respondents' claims, the trial court specifically held that fraud was not proved by the preponderance of the evidence. The trial court, examining in detail the evidence presented by

the petitioners, stated:

> "There was no illegality, wrongdoing, overreaching, or dishonesty in the giving of promissory notes evidencing the debts, and providing a later time for the payment of each note, and for the payment of lawful interest pending such payment." (Petition, App. 8)

ARGUMENT

Petitioners' assertion that the lower courts contravened and violated fundamental federal law is based on propositions which represent an erroneous, if not false, construction of the lower courts' opinions. An examination of the trial court's detailed finding of fact and law reveal that petitioners, in fact, were not expressly or impliedly prevented from presenting evidence of an express contract to establish their set-offs and counterclaims. Similarly, petitioners' assertion of the establishment of fraud has no basis.

We do not question petitioners' citation of cases for the proposition that strict rules of pleading are not applicable to a proof of claim in bankruptcy. However, no amount of strained semantics can convert that proposition as being applicable in the present case. The claim of error simply involves the findings of fact by the trial court which are not to be set aside unless the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *United States v. United States Gypsum Co.*, 333 U. S. 364, 68 S. Ct. 525, 92 L. Ed. 746 (1948).

Where the decision of the Court of Appeals sought to be reviewed turns upon an appreciation of the particular facts involved, including the inferences to be drawn from the evidence, a petition for certiorari lacks substantial grounds for review by this Court. *General Talking Pictures Corp.*

v. Western Electric Co., 304 U. S. 175, 58 S. Ct. 849, 82 L. Ed. 1273.

Manifestly, the petitioners do not assert any conflict of decisions within the circuits nor raise a question of first impression. The issue raised by petitioners does not warrant review by this Court. This is not a decision where the lower courts have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1965

No. —653

ANNA C. BRANDO, as Administratrix of the Estate of MARLON BRANDO, SR., Deceased, and MARLON BRANDO, JR.,

Petitioners,

vs.

IN THE MATTER OF BLACK RANCHES, INC., A Nebraska Corporation, Debtor, in Corporate Reorganization Proceedings under Chapter X of the Federal Bankruptcy Act.

ROE R. BLACK, AVIS C. BLACK, ROE C. BLACK, BLACK RANCHES, INC., A corporation, Debtor, and THOMAS HART FISHER,

Respondents.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1965

No. ——

IN THE MATTER OF BLACK RANCHES, INC., A Nebraska Corporation, Debtor, in Corporate Reorganization Proceedings under Chapter X of the Federal Bankruptcy Act.

ROE R. BLACK, AVIS C. BLACK, ROE C. BLACK, BLACK RANCHES, INC., A corporation, Debtor, and THOMAS HART FISHER,

Petitioners,

vs.

ANNA C. BRANDO, as Administratrix of the Estate of MARLON BRANDO, SR., Deceased, and MARLON BRANDO, JR.,

Respondents.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Cross-petitioners Anna C. Brando, as Administratrix of the Estate of Marlon Brando, Sr., Deceased, and Marlon Brando, Jr., pray that a writ of certiorari be granted to review and reverse the decision of the United States Court of Appeals for the Eighth Circuit and to remand the case

to the District Court of the United States for the District of Nebraska for further proceedings in that court, the writ to issue only in the event this court should grant the petition for a writ of certiorari in No. 544 of this term.

OPINIONS BELOW

The opinion of the District Court of the United States for the District of Nebraska is unreported. The opinion of the Circuit Court of Appeals, printed in the petition in No. 544, is reported in 362 F. 2d 19.

JURISDICTION

The court of appeals entered a judgment on May 12, 1966. Petitioners' petition for rehearing (with motions (1) That the language of the Court of Appeals' opinion be amended, and (2) that the Court of Appeals hear such petition and motions with such other judge or judges of some other United States Court of Appeals as might be designated by the United States Supreme Court) was denied without a supplemental opinion on June 21, 1966. Petitioners filed within ninety days thereafter in this Court a petition for writ of certiorari. This cross-petition is filed within thirty days after the filing of that petition.

This Court's jurisdiction is invoked under Section 1254 (1) of the United States Judicial Code (U. S. C. A., Tit. 28, Sec. 1254 (1)), which confers on this Court jurisdiction to review decisions of the United States Courts of Appeals.

The United States District Court's jurisdiction was based upon the provisions of the Federal Bankruptcy Act (U. S. C. A., Title 11, Chap. 2, Section 2).

QUESTIONS PRESENTED

1. Whether the trial court and the Court of Appeals,

in allowing cross-petitioner Marlon Brando, Jr.'s claim No. 22 after specifically upholding the validity of the two promissory notes and expressly finding no illegality, wrongdoing, overreaching, or dishonesty in the giving of the notes, could properly deny the validity of the two mortgages on the debtor's real estate which were given to cross-petitioner contemporaneously with the notes?

2. Whether the trial court and the Court of Appeals could properly deny cross-petitioner Marlon Brando, Jr.'s claims Nos. 19 and 20, based upon contracts between cross-petitioner and Roe R. Black, where the evidence demanded the finding of those debts were also the debts of the debtor corporation?

3. Whether the trial court and the Court of Appeals could properly (1) allow Roe R. Black's claim No. 12 and Thomas Hart Fisher's claim No. 13 and (2) not subordinate those claims to the other unsecured claims, where the evidence conclusively established that Black manipulated and commingled the corporate assets with those of his other operations, used the assets of the debtor corporation for his own personal benefit and profit, and did not account for those assets in the proceedings?

STATEMENT OF THE CASE

On October 22, 1954, in the District Court of the United States for the District of Nebraska five creditors instituted proceedings against The Black Ranches, Inc., a Nebraska corporation, pursuant to the corporate reorganization provisions of Chapter X of the Federal Bankruptcy Act. Petitioners, in No. 544 of this Court's October, 1965, term, filed a petition for a writ of certiorari for the review of a question which in our view does not warrant a granting of the writ. However, if the Court grants the petition in

No. 544, we believe that it should review the entire case and correct the obvious errors in the court below with respect to the questions enunciated herein. Accordingly, we are filing this conditional cross-petition.

The issues raised in this cross-petition arose as a result of an involved series of transactions connected with the operation and manipulation by Roe R. Black of the debtor corporation and its assets. Concerning the first aforementioned question, the lower courts held that Marlon Brando, Jr.'s claim No. 22, based upon two promissory notes, was not a secured claim. The trial court, upholding the validity of the two promissory notes, specifically found:

> "There was no illegality, wrongdoing; overreaching, or dishonesty of giving promissory notes evidencing the debts, and providing a later time for the payment of each note, and for the payment of lawful interests pending such payment." (Petition, App. 8)

Despite this express finding, the trial court failed to uphold the validity of the two mortgages on the debtor's real estate which were given to claimant contemporaneously with the notes as security for the debts.

The court's rationale was based upon the fact that at the time the first mortgage was given the mortgagee, Brando's father, was an officer and director of the debtor corporation, and when the second mortgage was given, the senior Brando was managing the corporation's Nebraska ranch. By virtue of these facts, the court concluded that the giving of the mortgages was a breach of the fiduciary duty on the part of Marlon Brando, Sr., who was an attorney in fact for Marlon Brando, Jr. However, Jean A. Cobbey was also an officer and director of the corporation and owned as trustee all the debtor's corporate stock.

Concerning the sceond aforementioned question, Marlon Brando Jr.'s claim Nos. 19 and 20, based upon contracts between Marlon Brando, Jr. and Roe R. Black, were denied. The basis of the court's refusal to allow these claims was the finding that the contracts were not an obligation of the corporation. The totality of the mass of evidence, however, display that Roe R. Black's method of operation involving the corporation's real estate and other assets, and his involved manipulation in connection with his cattle operations, amounted to a scheme devised to defraud his cattle customers and others of vast sums of money, and that these facts bring him and his corporation, which he controlled at all times, within the rule that his debts and obligations are the debts and obligations of the corporation.

Concerning the third aforementioned question, claim Nos. 12 and 13 were allowed in the total amount of $78,-641.75, one-half to Thomas Hart Fisher by virtue of an assignment from Roe R. Black. The trial court found that Roe R. Black had sold some equipment to the debtor corporation despite the evidence that Black used the assets of the corporation for his own personal benefit and profit. Such assets were not accounted for in the proceedings. In addition, due to the gross undercapitalization of the corporation, the sums of money provided by Black should have been regarded as capital supplied to the corporation.

The trial court, recognizing the infirmity of Black's claim, stated:

> "It will be observed that in its response to the third and final phase of the objector's position, the court has found only that objector's position there taken 'is not proved.' It hesitates categorically to declare that that position is objectively and certainly untrue." (Trial Ct's. Op. 176)

ARGUMENT

In denying Marlon Brando Jr.'s claim No. 22 as a secured claim, the lower courts contravened established Nebraska law which upholds the validity of mortgages to corporate officers and directors. The lower court, for all practical purposes, held that under no circumstances could a corporation secure a corporate officer for money advanced for the use of the corporation, even in the absence of illegality, wrongdoing, overreaching, or dishonesty. *Boevink v. D. Christianse,* 69 Neb. 256, 95 N. W. 652; *Goerder v. Plattsmouth Canning Co.,* 36 Neb. 548, 54 N. W. 830; *Gordon v. Stewart,* 4 Neb. Unof. 852, 96 N. W. 624. See also *Twinlick Oil Co. v. Marbury,* 91 U. S. 589.

In respect to the second and third aforementioned questions, this Court should enunciate guidelines in respect to (1) the validity and the status in equity of claims made by an owner of a one-man corporation; and (2) contracts involving the debtor corporation made by an owner of a one-man corporation with third parties. As stated by this Court, fraud is often and easily practiced upon the public by one-man corporations:

> "In all the experience of the law, there has never been a more prolific breeder of fraud than the one-man corporation. It is a favorite device for the escape of personal liability. This case illustrates another frequent use of this fiction of corporate entity, whereby the owner of the corporation, through his complete control over it, undertakes to gather to himself all of its assets to the exclusion of its creditors." *Pepper v. Litton,* 308 U. S. 295, 84 L. Ed. 281, 60 S. Ct. 238, 248 f.n. 28.

Clearly, the questions presented are of importance in the administration of the Federal Bankruptcy laws and in the

public interest as pertain to the prevention of fraud by one-man corporations. The lower courts, sitting in equity in bankruptcy matters, should be given guidelines respecting the above-mentioned matters.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that in the event that the court should grant the petition for a writ of certiorari in No. 544, this petition for a writ of certiorari should likewise be granted.

Respectfully submitted,

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No. 543

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

IN THE MATTER OF BLACK RANCHES, INC., A Nebraska Corporation, Debtor, in Corporate Reorganization Proceedings under Chapter X of the Federal Bankruptcy Act.

ROE R. BLACK, AVIS C. BLACK, ROE C. BLACK, BLACK RANCHES, INC., a corporation, Debtor, and THOMAS HART FISHER,

Petitioners,

vs.

PAUL STRAND, OTTO LAMPRECHT AND HOWARD THOMPSON,

Respondents.

MOTION FOR ISSUANCE OF PEREMPTORY WRIT OF CERTIORARI AND PEREMPTORY JUDGMENT OF REVERSAL WITHOUT ORAL ARGUMENT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 543

IN THE MATTER OF BLACK RANCHES, INC., A Nebraska Corporation, Debtor, in Corporate Reorganization Proceedings under Chapter X of the Federal Bankruptcy Act.

ROE R. BLACK, AVIS C. BLACK, ROE C. BLACK, BLACK RANCHES, INC., a corporation, Debtor, and THOMAS HART FISHER,

Petitioners,

vs.

PAUL STRAND, OTTO LAMPRECHT AND HOWARD THOMPSON,

Respondents.

MOTION FOR ISSUANCE OF PEREMPTORY WRIT OF CERTIORARI AND PEREMPTORY JUDGMENT OF REVERSAL WITHOUT ORAL ARGUMENT.

Now come Petitioners, Roe R. Black, Avis C. Black, Roe C. Black, Black Ranches, Inc., a corporation, Debtor, and Thomas Hart Fisher, and respectfully move this Court to issue its peremptory writ of certiorari and peremptory

judgment of reversal without oral argument, and to remand the case to the District Court of the United States for the District of Nebraska for further proceedings in that Court.

And in support of such motion, Petitioners respectfully show unto this Honorable Court:

1. The primary ground upon which the Petition for Writ of Certiorari has been sought in this case is that the trial judge admitted in his own opinion and decision, which he rendered on December 4, 1964, that he allowed a secured lien claim in the amount of $96,107.73 on Debtor's land in Brown and Blaine Counties, Nebraska, in the Federal Bankruptcy Court *solely upon the basis of what the trial judge himself described as "temporary access to partial abstracts of title* to the several parcels of Debtor's real estate," which the trial judge had obtained OUTSIDE OF THE COURTROOM and LONG AFTER THE TRIAL ITSELF WAS OVER (R. 133-4).

Although this question was fully argued in the Court of Appeals, it was not even mentioned in the Court of Appeals' opinion.

2. Respondents, Paul Strand, Otto Lamprecht and Howard Thompson, have deliberately failed and refused to file any brief in opposition to our Petition for Writ of Certiorari in this case, THEREBY ADMITTING THE TRUTH OF THE FACTS STATED ABOVE, *i.e.*, that the District Judge allowed in the Bankruptcy Court a secured lien against Debtor's land in the amount of $95,107.73 *without any evidence whatsoever in the record to support it and based solely upon "partial abstracts of title" to Debtor's land obtained by the trial judge outside of his courtroom and long after the trial was over.*

3. In the face of the foregoing admission, Petitioners respectfully submit that *no oral argument is required* to demonstrate that the judgment of the trial judge in the Bankruptcy Court in question was and is A VOID JUDGMENT and should be peremptorily reversed without the necessity of any oral argument, thus disposing of this case in this Court without any burden to the Court, in the light of the plain and undeniable violation of Federal law pointed out in our petition and repeated in the motion above.

MOTION FOR THE ISSUANCE OF PEREMPTORY WRIT OF CERTIORARI AND PEREMPTORY JUDGMENT OF REVERSAL WITHOUT ORAL ARGUMENT.

Wherefore, Petitioners respectfully move the Court to issue its peremptory writ of certiorari to review and reverse the judgment of the United States Court of Appeals for the Eighth Circuit in the case there entitled "*In the Matter of Black Ranches, a Nebraska Corporation, Debtor, Roe R. Black, et al., Appellants, vs. Paul Strand, et al., Appellees,* No. 17990, reported in 362 Fed. (2d) 8, by its peremptory judgment of reversal without oral argument, and to remand this case to the District Court of Nebraska for further proceedings in that court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

IN THE MATTER OF BLACK RANCHES, INC., A Nebraska Corporation, Debtor, in Corporate Reorganization Proceedings under Chapter X of the Federal Bankruptcy Act.

ROE R. BLACK, AVIS C. BLACK, ROE C. BLACK, BLACK RANCHES, INC., A corporation, Debtor, and THOMAS HART FISHER,

Petitioners,

vs.

ANNA C. BRANDO, as Administratrix of the Estate of MARLON BRANDO, SR., Deceased, and MARLON BRANDO, JR.,

Respondents.

ANSWERING BRIEF OF PETITIONERS IN OPPOSITION TO RESPONDENTS' "CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

IN THE MATTER OF BLACK RANCHES, INC., A Nebraska Corporation, Debtor, in Corporate Reorganization Proceedings under Chapter X of the Federal Bankruptcy Act.

Petitioners,

ROE R. BLACK, AVIS C. BLACK, ROE C. BLACK, BLACK RANCHES, INC., A corporation, Debtor, and THOMAS HART FISHER,

VS.

ANNA C. BRANDO, as Administratrix of the Estate of MARLON BRANDO, SR., Deceased, and MARLON BRANDO, JR.,

Respondents.

ANSWERING BRIEF OF PETITIONERS IN OPPOSITION TO RESPONDENTS' "CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT."

Respondents' so-called "Conditional Cross-Petition for a Writ of Certiorari" raises only *three factual questions*, each of which had been decided by the trial judge based upon the evidence in the trial court, to-wit:

1. Assuming that Debtor's two promissory notes embodied in Marlon Brando, Jr.'s Bankruptcy Claim No. 22 were correctly held to be valid by the trial court, was there sufficient factual evidence to support the trial judge's factual finding that the two mortgages on Debtor's real estate securing these two notes were the result of fraud and breaches of fiduciary duty on the part of the claimant, Marlon Brando, Jr.?

2. Was there sufficient factual evidence in the trial court to support the trial judge's factual finding that two contracts between Marlon Brando, Jr. and Roe R. Black individually were not in fact the debts of Debtor?

3. Was there sufficient factual evidence in the trial court to support the trial judge's factual finding that Roe R. Black did not manipulate or commingle Debtor's assets with his own "operations," or use Debtor's assets for his own personal benefit or profit without accounting for the same?

Under the well known "clearly erroneous rule," upon which Respondents rely in their answering brief to our Petition for Certiorari (pages 4 5) by citing *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, the burden is thus admittedly upon Respondents to show in their Conditional Cross-Petition that the trial court's findings of fact on each of the three factual issues mentioned above were "clearly erroneous." RESPONDENTS DO NOT EVEN ATTEMPT TO DO THIS IN THEIR CONDITIONAL CROSS-PETITION.

After trying (p. 4) to confuse the validity of the promissory notes with the validity of the two mortgages on Debtor's lands securing them, Respondents assert (p. 5) that "The totality of the mass of evidence" supposedly showing that in fact Roe R. Black's "method of operation . . . amounted to a scheme devised to defraud his cattle

customers and others of vast sums of money" was sufficient to bring Debtor "within the rule that his [Black's] debts and obligations are the debts and obligations of the Debtor corporation." HOWEVER, NOT A SINGLE CITATION TO THE RECORD SUPPORTS ANY OF THESE FACTUAL CLAIMS.

Similarly, Respondents assert (page 5) that there was "evidence that Black used the assets of the corporation for his own personal benefit and profit," despite the factual finding of the trial court that Black did nothing but sell some equipment to the Debtor corporation (Supp. R. 19-27). And Respondents add (p. 5) that the facts show that there was "gross under-capitalization" of Debtor, so that "the sums of money provided by Black should have been regarded as capital supplied to the corporation," despite the factual finding of the trial court directly to the contrary (Supp. R. 31).

Respondents' "Argument" (p. 6) is the incredible one that, merely because the trial court held (1) that Black's method of operation did not in fact amount to a scheme devised to defraud his cattle customers and others, (2) that his debts and obligations were not in fact the debts and obligations of Debtor, (3) that Black did not in fact use the assets of Debtor for his own personal benefit and profit and did account for all of it in the trial court, and finally (4) that there was in fact no gross or other under-capitalization of Debtor, it follows that "for all practical purposes" the trial court and the Court of Appeals erroneously held in this case that "under no circumstances could a [meaning "any"] corporation secure a corporate officer for money advanced for the use of the corporation, even in the absence of irregularity, wrongdoing, overreaching or dishonesty," citing various Nebraska cases, none of which have any bearing upon the Brando Claim No. 22 to which this whole "Argument" is directed (p. 6).

Respondents' whole "Argument" (pp. 6 7) is thus exclusively directed to an effort to review the trial court's factual finding that the two mortgages securing the Brando Claim No. 22 were both fraudulent and void, as the trial court held and the Court of Appeals confirmed, without one word being directed in the "Argument" to Questions 2 and 3 (dealing with Claims Nos. 19, 20, 12 and 13) which are the primary "Questions Presented" in the Cross-Petition (p. 3).

In other words, Respondents' entire "Argument" deals only with Claim No. 22 and says nothing at all about Claims Nos. 19, 20, 12 and 13, and yet this "one-man corporation" argument relates only to Claims Nos. 12 and 13 and has nothing to do with Claim No. 22, or for that matter with Claims Nos. 19 and 20.

Apparently this "Conditional Cross Petition" is filed in the hope of drawing the Court's attention away from the simple issue raised in our Petition for Certiorari by pretending that the granting of our Petition will compel the Court to consider numerous other questions, even though there is not one word in Respondents' Cross-Petition to show that any of these side issues of fact has anything to do with the simple but highly important issues which are presented in our Petition.

For the foregoing reasons, whether or not this Court grants our Petition for Certiorari, we respectfully submit that Respondents' Conditional Cross-Petition for Writ of Certiorari should be peremptorily denied.

Respectfully submitted,

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No. 544

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

IN THE MATTER OF BLACK RANCHES, INC., A Nebraska Corporation, Debtor, in Corporate Reorganization Proceedings under Chapter X of the Federal Bankruptcy Act.

ROE R. BLACK, AVIS C. BLACK, ROE C. BLACK, BLACK RANCHES, INC., a corporation, Debtor, and THOMAS HART FISHER,

Petitioners,

vs.

ANNA C. BRANDO, as Administratrix of the Estate of MARLON BRANDO, SR., Deceased, and MARLON BRANDO, JR.,

Respondents.

REPLY BRIEF FOR PETITIONERS

LESLIE R. BISHOP
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Respondents.

REPLY BRIEF FOR PETITIONERS

Respondents' answering brief is based upon two falsehoods:

1. Respondents' brief tries to deceive this Court into the erroneous belief that there never was any signed agreement by Marlon Brando (in the form of a corporate resolution of Black Ranches, Inc. *bearing Marlon Brando's*

own signature) which required Brando to pay a grazing fee of $4 per head per month upon the many thousands of Brando-owned cattle which were grazed upon Debtor's land during the 3½ year period from April, 1952, to September, 1955, and under which written agreement respondents failed to pay Debtor the sum of $99,108.50.

Obviously, if respondent's contention were *true,* petitioners would have no complaint, for respondents would have succeeded in perverting the issues *by substituting a false issue of fact for an admitted breach of fundamental bankruptcy law (see below).* But respondents' factual contention is flatly *untrue,* as we shall now demonstrate beyond any doubt.

We ask this Court to turn to pages 129 and 548-9 of the printed Record on Appeal, where the Court will find that Marlon Brando signed his own name "Marlon Brando" under the word "Approved," in his capacity as chairman of the Directors' meeting held on May 8, 1952, *at which the following resolution was unanimously adopted by Marlon Brando and the two other Directors of Debtor* (said three Directors constituting the entire Board of Directors of Debtor):

> "RESOLVED, that as of April 15, 1952 Penny Poke Ranch, [a corporation wholly owned by the Brandos], Marlon Brando and Marlon Brando, Jr., shall pay Black Ranches, Inc. $4.00 per head per month for each weaned animal, plus any additional feed Black Ranches, Inc. is required to purchase on behalf of said Penny Poke Ranch, Marlon Brando and Marlon Brando, Jr.
>
> * * *
>
> APPROVED: [signed] Marlon Brando, Chairman of the Meeting."

Moreover, Marlon Brando testified under oath (R. 409):

> "I attended the [Directors] meeting and *signed minutes of the meeting of the Board of Directors of*

the Debtor held on May 8, 1952, which show that a resolution was *unanimously adopted,"* to the foregoing effect, *i.e.,* that as of April 15, 1952, Penny Poke-Brando group became obligated to pay Debtor $4 per head per month as a grazing fee for each of their weaned animals which were grazed upon Debtor's land after April 15, 1952, plus any additional cattle feed which was purchased by Debtor and fed to their Penny Poke-Brando cattle. (Emphasis added.)

Brando further testified (R. 40-410) that when J. A. Cobbey, who was Vice-President and Treasurer of Black Ranches, Inc. and one of the Directors who attended said stockholders' meeting, had first proposed a grazing fee on all of Brando's grown and weaned cattle of $4 per head per month, Brando had responded:

> *"I accepted it,* although I didn't like it because I thought it was higher than the going rate." (Emphasis added.)

Although there were other cattle of other owners than Brando which were being grazed on the Black Ranch for which they were paying a grazing charge from $4.50 per month (R. 409) to as high as $6 per head per month (R. 430).

With this sworn oral testimony in the record, respondents had no need to prove a *written* contract in order to bind Brando to pay Debtor the unpaid grazing fee of $99,108.50. But respondents DID prove such a written contract.

J. A. Cobbey, the other Director of Debtor, confirmed Brando's foregoing testimony in his own sworn testimony. He testified (R. 431):

> "I had made some investigation and I thought he [Brando] should pay $4 a head—it was figured out on that basis. My office figured out the $4. . . . *He*

> [*Brando*] *did agree to this $4 charge I made to him, though he was against it.*" (Emphasis added.)

Cobbey also testified (R. 432) that

> "It was my understanding that the $4 charge would include *all cattle on our* [*Debtor's*] *ranch of Marlon Brando, Jr. or Marlon Brando, Sr., or Penny Poke.* . . . If there were *any other cattle,* there was [also] to be *a* [*like*] *payment to the Debtor on them.*".

It is true, as respondents say in their answering brief (p. 3), that the trial judge "stated" during the trial that, *EXCEPT for Debtor's corporate minutes which were approved by Brando's own signature,* there was "no [written] evidence of a bilateral contract" requiring Brando to pay a grazing fee of $4 per head per month to Debtor upon all Brando-owned cattle which were grazed upon Debtor's land. But of course our whole point in our petition for the writ of certiorari is that there *WAS a signed agreement bearing Marlon Brando's own signature* (in the form of the corporate resolution setting a $4 per head per month grazing fee on Brando-owned cattle), and it was for this reason and this reason only, that the trial judge felt obliged to hold, in plain violation of fundamental bankruptcy law, as the Circuit Court's opinion shows (our petition, Appendix I, page 25):

> "Having relied upon *quantum meruit,* appellants [petitioners] cannot now switch their primary reliance to the [written] corporate resolution [even though signed by Marlon Brando himself] and, thereby, to an express contract theory."

Respondents boldly but fallaciously argue in their answering brief (p. 4) that petitioners have made "an erroneous, if not false, construction of [both] the lower courts' [the District Court and the Court of Appeals]

opinions," because "petitioners, in fact, were not expressly or impliedly *prevented from presenting evidence of an express* [*written*] *contract,*" upon which to base their right to recover from respondents the unpaid $4 per head per month grazing fee amounting to $99,108.50. We say that this argument represents respondents' (*not* petitioners') "erroneous, if not false, construction of [both] the lower courts' opinions," because petitioners have never, either "expressly" or "impliedly," asserted that *petitioners* were "prevented from presenting evidence of an express contract," upon which to base their right to recover from respondents the unpaid $4 per head per month grazing fee amounting to $99,108.50. In fact, directly to the contrary, petitioners' whole contention is that, far from being prevented from presenting evidence of an express contract, the *express written contract* in the form of the "approved" directors' resolution adopted and then approved in writing by Marlon Brando's own signature, was their own direct, positive and uncontrovertible evidence of the existence of such written agreement, which they themselves offered in evidence in this case.

This brings us back to the primary point in our petition for certiorari, namely, that the sole ground for the denial by both the District Court and the Court of Appeals of petitioners' right to recover the $99,108.50 which was due but unpaid to Debtor by the Brandos on their $4 per head per month grazing fee, was their untenable holding (Appendix I, p. 24), completely contrary to fundamental bankruptcy law (which law is cited on page 7 of our petition for certiorari) that, even though there was undeniably an express contract between Debtor and Brando, it could not be relied upon by Debtor and enforced by the bankruptcy court, merely because such express contract was not PLEADED in petitioners' set-offs and counterclaims.

We therefore regard the following admission in respondents' brief (p. 4) as a *confession of error* that both the trial court and the Court of Appeals had violated fundamental bankruptcy law:

> "We [respondents] *do not question* petitioners' citation of [Federal] cases for the proposition that *strict rules of pleading are NOT applicable to a proof of claim in bankruptcy.*" (Emphasis added.)

All of which makes quite ridiculous respondents' further contention (p. 3) that "petitioners do not assert any *conflict of decisions* within *the circuits.*" *For the plain and unalterable fact is that the decision in this case is directly in conflict with the decisions in the Second Circuit (3 decisions), the Fifth Circuit (1 decision), and the Eighth Circuit itself (2 decisions), all of which conflicting decisions are cited in the first paragraph at the top of page 7 of our petition.*

Therefore, respondents are only trying, as we have already said above, to deceive this Court when they falsely contend (1) that we have not shown "any conflict within the circuits," and (2) that all that is involved here are "findings of fact by the trial court," in respondents' attempt to invoke the "clearly erroneous" rule. However, *since there is no dispute of fact whatsoever over the written agreement in the form of a signed corporate resolution bearing Brando's own signature,* it is obvious that respondents' desperate but false pretense that there is only a disputed issue of fact, which make the "clearly erroneous" rule applicable, is merely a form of "strained semantics," to use respondents' own cogent phrase (p. 4).

On the basis of what is said above, we submit that this Court, *merely by reading respondents' answering brief,* can readily determine that the decision of both of the lower

courts in this case *is squarely in conflict with the prior decisions of the Second, Fifth and Eighth Circuits which we have cited, and represents a gross distortion of Federal Bankruptcy Law which is more than sufficient to justify the granting of the writ of certiorari in this case.*

2. Respondents' brief further tries to deceive this Court into the erroneous belief that there was no evidence that the grazing fee of $4 per head per month amounting to $99,108.50, which was incontestably due Debtor from Brando in accordance with the corporate resolution approved in writing by Brando, had ever in fact been paid to Debtor. But the trial judge's holding (R. 260-1) that the "accounting" between the Brandos and Debtor "as it is presented to the [trial] court," which "accounting," as the trial judge conceded, was "characterized" by "something less than perfection," had failed to "persuade" the trial court that Debtor had been "overreached" by the Brandos' failure to pay Debtor the $4 per head per month grazing fee, was so vague that respondents do not even cite it, let alone quote it, in their brief.

The *falsity* of this second contention in respondents' brief *is plainly revealed and admitted by respondents' following statement in their own brief (p. 3)*:

> "The trial court also concluded that [only] $3.00 per head per month was reasonable and that Black Ranches Inc. had received credit *in that amount* [*i.e.*, the amount of $3, but *not* the amount of $4 per head per month]."

Moreover, the Court of Appeals' opinion (App. I, 25) itself shows that it correctly concluded that *"there was ample evidence that* [*only*] *$3 per head per month was credited Debtor"* for grazing the Brando-owned cattle on Debtor's land.

Thus the fact that the $4 per head per month grazing fee (upon which the sum of $99,108.50 is still due) was not paid to Debtor by Brando is not only proven by the trial judge's own holding, but is confirmed by the Court of Appeals' own opinion as well.

CONCLUSION

Since respondents concede (a) that both the trial court and the Court of Appeals have denied petitioners' claim to $99,108.50 (as the unpaid portion of the $4 per head per month grazing fee) *solely because of petitioner's failure to PLEAD the written agreement in the form of the corporate resolution signed by Marlon Brando,* and since the respondents also concede (b) that it has been repeatedly held by the other Circuit Courts of Appeals (for the Second, Fifth and Eighth Circuits) that "strict rules of PLEADING are NOT APPLICABLE to a proof of claim in bankruptcy," it is incontestable that the decisions in this case in both of the courts below violate fundamental bankruptcy law, as laid down in the Second, Fifth and Eighth Circuit Courts of Appeals in these earlier cases which we have cited in our petition (top, page 7).

Therefore petitioners respectfully submit that this Court should issue its peremptory writ of certiorari *without the necessity of an oral argument in this Court,* and should reverse the judgments of the lower courts and remand this case to the District Court of Nebraska for further proceedings there, to the end that petitioners' fundamental rights under Federal Bankruptcy Law herein claimed may be effectuated.

Respectfully submitted,

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